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No. 01 526 SEP 26 2001

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In The

Supreme Court of the United States

SUZANNE C. COSTO, AS PERSONAL REPRESENTATIVE FOR NOLLIE P. COSTO; PEDRO COSTO, HUSBAND; ROSA COSTO, WIFE; JEFFREY GRAHAM, AS PERSONAL REPRESENTATIVE FOR CHRISTOPHER J. GRAHAM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. WEPPNER
Counsel of Record
LAW OFFICE OF ROBERT A. WEPPNER
2133 Third Avenue, Suite 108
Seattle, WA 98121-2387
(206) 728-9332

STEVEN S. ROSENTHAL
HOLLAND & KNIGHT, L.L.P.
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006-6801
(202) 955-3000

J. MICHAEL KOCH
LAW OFFICE OF J. MICHAEL KOCH & ASSOCIATES, P.S., INC.
Post Office Box 368
Silverdale, WA 98383
(360) 692-5551

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671-2680) ("FTCA") waives the federal government's sovereign immunity for certain tort actions. It specifically excepts 13 enumerated types of claims, including those "arising out of the combatant activities of the military . . . during time of war." *Id.*, § 2680(j). In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court found that Congress also intended to except claims based on injuries to members of the United States armed forces that "arise out of or are in the course of activity incident to service." The questions presented in this case are:

1. Whether the Ninth Circuit properly broadened this Court's decisions and the exceptions to the FTCA when it held that the *Feres* doctrine barred suit for two off-duty sailors' deaths, occasioned by civilian negligence during a recreational river-rafting trip 75 miles off-base during a Fourth of July vacation, where most rafters were civilians and the sole military nexus was that the trip happened to be under the aegis of a Navy base recreation program.

2. Whether, in view of the widespread and long-standing condemnation of *Feres*, and where the panel below only "reluctantly" and "without relish" denied relief in "yet another case that seems far removed" from *Feres*'s original purposes while calling for a "reorient[ation]" of the doctrine, this Court should revisit *Feres* and overrule it.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1-28) is reported at 248 F.3d 863. The court's denial of rehearing and rehearing *en banc* (App. 35-36) was not reported. The opinion of the district court (App. 29-34) was also not reported.

JURISDICTION

The court of appeals entered judgment on April 20, 2001 (App. 1), and denied rehearing on June 29, 2001. App. 35-36. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act are set forth in the Appendix. App. 37-40.

STATEMENT

Navy sailors DK2 Nollie P. Costo (29 years old) and AT3 Christopher J. Graham (20 years old) were stationed at the Whidbey Island Naval Air Station ("NAS Whidbey") in Washington State. They were killed during a rafting trip on the remote Nooksack River on July 1, 1995. The men's survivors and personal representatives brought a wrongful death action against the United States and claimed that the negligence of civilian government employees had caused the young men's deaths.

A panel of the Ninth Circuit held 2-1 that the suit was barred as falling within the "ever-expanding reach" of the doctrine first set out in *Feres v. United States*, 340 U.S. 135 (1950). App. 2. At the same time, however, the

panel stated that it arrived at this conclusion "only reluctantly" and that the case at bar "seem[ed] far removed from [*Feres*'s] original purposes. . . . " *Id.* The court ruled that precedent nonetheless would compel this "inequitable" result until this Court or Congress "reorients" the doctrine. App. 12.

I. The Judicial Creation Of The *Feres* Doctrine.

In 1946, Congress enacted the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA waives federal sovereign immunity for certain tort actions, over which it vests jurisdiction exclusively in the federal district courts. Specifically, the FTCA permits the imposition of liability

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id., § 1346(b). An "employee of the Government" is defined to include "members of the military or naval forces of the United States." *Id.*, § 2671. The FTCA also specifies that in "the case of a member of the military or naval forces of the United States" the phrase "acting within the scope of his office or employment" in section 1346(b) "means acting in [the] line of duty". *Id.*, § 2671.

The FTCA's broad waiver of immunity is subject to thirteen enumerated exceptions. *Id.*, § 2680. Among them, Congress expressly exempted "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.*, § 2680(j). This is the only exception that explicitly mentions the armed

services (although the FTCA also exempts claims "arising in a foreign country" or "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of . . . an employee of the Government"). *Id.*, § 2680(k), (a).

Not long after the FTCA was enacted, this Court decided *Brooks v. United States*, 337 U.S. 49 (1949). The Court there held the claims of two soldiers hit by an Army truck on a public highway were amenable to suit despite their service status. Observing that the statute granted the district court jurisdiction over any negligence claim against the United States, the Court stated that "[w]e are not persuaded that 'any claim' means 'any claim but that of servicemen.' " *Id.* at 51.

A year later the Court decided three consolidated cases in *Feres v. United States*, 340 U.S. 135 (1950). Two cases were for medical malpractice; the third, for a soldier's wrongful death in a barracks fire. Deciding that the court lacked jurisdiction over all plaintiffs' claims, the Court held that Congress intended in the FTCA to disallow tort suits "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

Over thirty-five years later, in *United States v. Johnson*, 481 U.S. 681 (1987), four dissenting Justices criticized *Feres* as "wrongly decided and heartily deserv[ing of] the widespread, almost universal criticism it has received." *Id.* at 701 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ.) (internal quotation marks omitted).

II. The Proceedings Below.

On July 1, 1995, Costo and Graham drowned during a river rafting trip when their boat flipped over and they were pinned beneath the water's surface. The accident

took place on the North Fork of the Nooksack River in rural Whatcom County, some 75 miles from NAS Whidbey. The men were off-duty and at liberty, and it was the first day of a four-day July 4th weekend. The raft trip was conducted under the aegis of the base's Morale, Welfare & Recreation ("MWR") program. However, fewer than half of the rafters were members of the armed services; one was a ten-year-old boy; and, indeed, the applicable eligibility rules provided that a myriad of civilians were entitled to participate. App. 26; ER 60;[1] see also Supp. ER 54-58 (identifying those eligible to take part in MWR programs). Not only were the on-site rafting guides civilians, but so were the guides' supervisors and their superiors, on up through five separate levels of the bureaucratic hierarchy. App. 3. The sole service member in this chain was at the top – NAS Whidbey's base commander. *Id.* But according to the civilian supervisor directly below him, the C.O. knew of the rafting program's existence just "[t]he same way he's aware of all programs aboard station. It's advertised. It's promoted in the newspapers. It's promoted in our MWR magazine." ER 88. Actionable negligence was most notably attributable to the civilian river guides. In the opinion of one local professional guide, they "were not qualified to guide the Nooksack that day. . . . ", "exercised poor judgment", and were "poorly equipped": "Their inexperience and the presence of a serious technical hazard on the river was an invitation for disaster." ER 45, 70.

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[1] The reference is to the Excerpts of Record filed by petitioners as part of their appeal to the Ninth Circuit. References to "Supp. ER" are to the Supplemental Excerpts of Record filed below by respondent.

On September 2, 1998, Costo's parents and personal representative and Graham's personal representative initiated this wrongful death suit against the government in the United States District Court for the Western District of Washington. Liability was premised on three distinct theories: the negligent hiring, training and supervision of the civilian guides who conducted the raft trip; the guides' failure to obtain the forest service permit required for the outing; and negligence in the guides' preparation for the trip, conduct of the trip, and failure to rescue. *See* App. 4.

On September 17, 1999, the government moved to dismiss on the basis of the *Feres* doctrine. The district court judge granted the motion. App. 29-34. It relied on four factors the Ninth Circuit had found relevant to whether an activity was "incident to service": the situs of the negligence, the plaintiff's duty status, the extent to which plaintiff accrued benefits because of his service status, and the nature of plaintiff's activities at the time of the negligence. App. 31. Critical in applying these factors was "whether the suit has a potential impact on military command and its disciplinary structure." App. 31-32.

The district court found that the site of the deaths – "over seventy-five miles away from the Naval Air Station and, therefore, not on military property" – was "not controlling" where "other factors weigh strongly in favor of a Feres bar." App. 32. Chief among these was that the rafting trip's "entire scope was subject to military orders and discipline" (citing *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986)). It explained that Costo and Graham might hypothetically have been prosecuted under the Uniform Code of Military Justice for "loss, damage, or

wrongful disposition" of the Navy's rafting equipment. In the district court's view, the availability of general UCMJ criminal sanctions, equally as much as the detailed and specific canoe rental regulations in *Bon*, proved the talismanic "presence of military control." App. 33-34. The "totality of the circumstances" thus led the court to find that the *Feres* doctrine precluded the court from entertaining plaintiffs' claims. App. 34.

The Ninth Circuit affirmed, observing that the Ninth – like several other Circuits – had "shied away from attempts to apply" the three rationales identified by this Court as undergirding the *Feres* doctrine: (1) the need for a uniform system of compensation arising from the "distinctively federal nature" of the government's relation to its armed forces; (2) the existence of an alternative "generous compensation scheme" in the form of the Veterans' Benefits Act; and (3) the potential danger to military discipline from allowing damage suits by military personnel. App. 6-7. Rather, it had formulated a test consisting of four factors which it would "consider" in determining whether *Feres* barred a suit, listing the same factors as had the district court. App. 7-8, citing *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1997). No single factor was "dispositive." App. 8. The court declared that it had "reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable," and instead endorsed a "comparison of fact patterns", rather than legal analysis, as the "most appropriate way to resolve *Feres* doctrine cases." App. 8.

The Ninth Circuit concurred that the *Bon* case was "closely analogous", but declined to agree that potential UCMJ criminal sanctions were a significant index of military regulatory control. The panel rejected plaintiffs' attempts to distinguish *Bon* as "unavailing". It thought

that ever since *Johnson, supra,* it was now "clear" that the alleged tortfeasors' civilian status was immaterial. App. 9. That the deaths had occurred some 75 miles off-base also did not "affect[ ]" its decision. *Id.* The court concluded sweepingly that "recreational activities sponsored by the military fall within the *Feres* doctrine. . . . " App. 10. "[W]hatever the original scope" of the *Feres* doctrine, it had now expanded "to include military-sponsored recreational programs." App. 12. The panel arrived at this conclusion "without relish", recalling that twenty years of Ninth Circuit decisions had repeatedly bemoaned "the inequitable extension of this doctrine to a range of situations that seem far removed from [its] original purpose." *Id.* However, until a higher authority effected a shift in the doctrine, the majority of the panel felt "bound to follow this well-worn path." *Id.*

REASONS FOR GRANTING THE PETITION

This case is a textbook presentment of a conundrum that has engendered doctrinal chaos in the courts of appeals for half a century: determining when a military claimant's injury is barred as resulting from an activity "incident to service" within the meaning of the *Feres* doctrine. Much more than merely an intriguing intellectual inquiry, this controversy is real and concrete not just to these plaintiffs, but to this country's over one-and-a-third million service members on active duty worldwide,[2] and their dependents.

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[2] *See* "Active Duty Military Personnel Strengths by Regional Area and by Country: December 31, 2000," published by the Statistical Information Analysis Division of the Department of Defense's Directorate for Information Operations and Reports (available at http://web1.whs.osd.mil/mmid/m05/hst1200.pdf).

One of the grievances the signers of the Declaration of Independence leveled at King George III over two centuries ago was that he had "affected to render the Military independent of and superior to the Civil Power." It would be ironic indeed if today there were no federal court jurisdiction over these 4th of July deaths essentially because the Navy owned the raft they died in. The Court's disposition of this case will serve notice to American service personnel whether their military status earns them, or denies them, those ordinary legal remedies enjoyed by their civilian counterparts. No civilian was hurt or killed on this raft trip, although non-military rafters predominated. App. 26. As the dissent observed, the panel opinion would permit "any of the civilians [if] injured or killed on the trip to sue," but "barred such recourse to the military personnel, despite the fact that the two suits would have implicated virtually identical policy concerns regarding the law of the situs and military decision-making." *Id.*; *cf. Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72 (1977) (identifying these two as among three rationales underlying *Feres* doctrine).

The Ninth Circuit's decision here conflicts with precedent from this Court and from other Circuits. But conflicts aside, it also forcefully raises the question posed by the four dissenting judges in *United States v. Johnson*, *supra*, and by the dissenting judge below: whether it is time for this Court to "revisit" and consider overruling the *Feres* doctrine. App. 28. The doctrine's application to a case such as this, so "far removed" from its original underpinnings, has once again led to an illogical and unjust result. The Court should grant this petition and either clarify the *Feres* doctrine's reach so that it fits the

ends it was designed to serve, or else abandon it altogether.

I. THE NINTH CIRCUIT'S TEST FOR WHAT IS "ACTIVITY INCIDENT TO SERVICE" AND ITS HOLDING THAT *FERES* SHOULD DENY PETITIONERS THEIR DAY IN COURT CONFLICTS WITH *BROOKS*, *FERES*, AND *BROWN*.

1. Relatively recently, in *United States v. Johnson*, this Court paraphrased the "incident to service" test as the inquiry whether a claimant sustained injury "because of his military relationship with the government. . . . " *Johnson*, 481 U.S. at 689 (*dicta*). Despite the multitude of circuit court decisions seeking to understand and to apply the *Feres* doctrine over nearly fifty years, it bears emphasizing that only the Supreme Court's three earliest FTCA cases have dealt directly with what the "incident to service" standard actually means: *Brooks v. United States*, 337 U.S. 49 (1949); *Feres* itself; and *United States v. Brown*, 348 U.S. 110 (1954).[3] The Court's recent formulation in

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[3] Discussion of the standard in this Court's other opinions has all been in *dicta*. "Incidence to service" was not at issue in *United States v. Muniz*, 374 U.S. 150 (1958) (whether *Feres*-type analysis should bar prisoners' FTCA suits); *Stencel*, *supra* (whether third-party could recover in indemnity for damages it paid to person injured incident to service); *Chappel v. Wallace*, 462 U.S. 296 (1983) (whether *Feres* analysis should disallow *Bivens* claims of plaintiff injured incident to service); *Johnson*, *supra* (whether civilian status of allegedly negligent tortfeasor prevented *Feres* bar when plaintiff's decedent was killed incident to service); or *United States v. Stanley*, 483 U.S. 669 (1987) (whether *Feres* should bar *Bivens* claim of plaintiff injured incident to service). In *United States v. Shearer*, 473 U.S. 52 (1985), the Court focused its *Feres* analysis exclusively on the threat of civilian meddling in questions of military control and discipline

Johnson pithily distilled the teachings of those three early cases. They thus deserve close scrutiny now because, had the court applied this test to plaintiffs' case, it would not have dismissed plaintiffs' lawsuit.

2. In the *Brooks* decision, Welker and Arthur Brooks and their father were in a car crash caused by a civilian driving a U.S. Army truck on a public highway. The Brooks brothers were both "in the armed forces . . . at the time of the accident." *Brooks*, 337 U.S. at 50. Arthur was killed and Welker was injured. The Fourth Circuit had reversed the trial court's denial of the government's motion to dismiss. The Supreme Court held that members of the armed forces could recover under the FTCA "for injuries not incident to their service." *Id.*

None of the exceptions expressly provided in the FTCA applied, held the Court. It was so obvious as not to require extended discussion that the exception for claims "arising out of combatant activities of" the armed forces was inapplicable to the case at bar. *Id.*, at 51; *see also* 28 U.S.C. § 2680(j). In light of the specific language of the exceptions, the Court held that the statute's grant of jurisdiction to the district court over "any claim" against the United States clearly meant just that, unless a claim was not specifically excepted. Moreover, the statutory scheme did not support the government's proffered gloss that the Court should only allow "any claim but that of servicemen." *Id.* The Court reasoned that precisely because the enactment explicitly excepted *some* claims of

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presented by the defendant tortfeasor's service status. The case is probably best viewed as "the rare case that warrants a free standing 'disciplinary' basis for a *Feres* bar . . . [,] the exception rather than the rule." *See Taber v. Maine*, 67 F.3d 1029, 1049 (2d Cir. 1995).

servicemen, jurisdiction was "plain" over those claims *not* textually excluded.

The Court downplayed the government's dire prediction of unwarranted exposure to future liability by observing that it here addressed only "an accident which had nothing to do with the Brooks's army careers, injuries not caused by their service except in the sense that all human events depend on what has already transpired." *Id.*, at 52. The Court expressly left for later consideration the matter of injuries received "incident" to a claimant's military service: then, "a wholly different case would be presented." *Id.*

3. The next year, three consolidated cases raised this very issue in *Feres v. United States*. The Second Circuit had affirmed the dismissal of a lawsuit brought on behalf of the eponymous Feres, who had died in a barracks fire allegedly caused by a faulty heating plant. In the two other cases, the Fourth Circuit had affirmed, and the Tenth reversed, dismissals of servicemen's medical negligence claims against Army surgeons. *Feres*, 340 U.S. at 137. The Court observed that the consolidated cases all dealt with claimants "on active duty and not on furlough, [who] sustained injury due to negligence of others in the armed forces."[4] *Id.*, at 138.

Echoing the Court's own language in *Brooks*, plaintiffs urged the Court to infer, from the specific statutory language excluding only claims arising from combat activities in wartime, Congress's intent to "allow[ ] claims arising from non-combat activities in peace". *See* 28 U.S.C. § 2680(j). The Court instead announced it would seek to construe the FTCA – "so far as will comport with

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[4] The Court might have also noted that the injuries in all three cases occurred on government property.

its words" – within the context of other statutory remedies against the government, "to make a workable, consistent and equitable whole." *Id.*, at 139. It distinguished the *Brooks* decision simply. That injury "did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, *under compulsion of no orders or duty and on no military mission.*" *Id.*, at 146 (emphasis added). The Court said it had allowed suit in *Brooks* "primarily because Brooks' relationship while on leave was *not analogous to that of a soldier injured while performing duties under orders.*" *Id.* (emphasis added). By contrast, the Court stated a disjunctive test: there could be no liability under the FTCA for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." *Id.*

4. Next, in *United States v. Brown*, the Court faced a claimant who had been honorably discharged after injuring his knee while on active duty. Seven years later, during his second military hospital knee operation, an allegedly defective tourniquet led to permanent nerve damage. He sued under the FTCA, and the Court ultimately granted certiorari "because of doubts whether *Brooks* . . . or *Feres* . . . controlled this case." *Brown*, 348 U.S. at 111.

The Court found *Brooks* more apt. Brown was neither "on active duty [nor] subject to military discipline" and thus his suit fell within that *"broad pattern of liability* which the United States undertook by the Tort Claims Act." *Id.*, at 112 (emphasis added). The Court purported to reaffirm what it called *Feres*'s distinction "between

injuries that did and injuries that did not arise out of or in the course of military duty." *Id.*, at 113.[5]

5. The application of *Brooks*, *Feres*, and *Brown* in this case would have allowed plaintiffs' claims to proceed. It is plain that Costo's and Graham's deaths on a holiday rafting trip did not occur "because of [their] military relationship with the government." *Johnson*, 481 U.S. at 689. As in *Brooks*, the sailors' deaths could only be said to have been "caused" by their service status "in the sense that all human events depend on what has already transpired." *Brooks*, 337 U.S. at 52. Just as in *Brooks*, while recreating on the Nooksack River they were under "compulsion of no orders or duty and on no military mission", and their relationship to the Army when killed was no more "analogous to that of a soldier injured while performing duties under orders" than the young Brookses'. *See Feres*, 340 U.S. at 146. On the facts in this record, it is manifest that whatever flow-chart responsibility the base commander might technically have had on paper, he had no actual involvement in the rafting program that led to the men's deaths. Put colloquially: the buck could not "stop" at the C.O.'s desk without getting there first.

The *Feres* decision itself would seem to allow plaintiffs' claims. There the claimants were all injured while on

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[5] In its *Brown* formulation (*id.*, at 113) the Court did not mention *Feres*'s "incident to service" language. One could conclude from this omission that the Court meant to abandon one-half of *Feres*'s disjunctive test, so that thereafter the FTCA would only bar an injury if it arose out of or in the course of *military duty*. (*Johnson*'s *dicta* itself further suggests this is the case.) Barring suits for injuries sustained "incident to service" would arguably have disallowed Brown's medical malpractice claim, as his post-discharge access to V.A. benefits was an "incident" of his military service.

active duty, not on furlough, and due to the negligence of others in the armed forces. *Feres*, 340 U.S. at 138. The *Feres* plaintiffs' injuries were all sustained on military reservations. Here, although Costo and Graham were not actually on furlough, they were on prolonged liberty far from their duty stations. Another panel upheld a claimant's right to sue by saying that "the fact that he was off-duty is certainly not irrelevant to a determination whether his injuries were suffered 'incident to service.' " *Dreier*, 106 F.3d at 853-54 n.8. And here, unlike in *Feres*, there is no hint in the record of negligence by any military service member – only by civilians.[6]

Even more strongly does *Brown* support plaintiffs' position. While plaintiffs' decedents were admittedly on active duty status, they were at liberty and thus not "subject to military discipline" except (as are all non-discharged servicemen) in the strained UCMJ sense relied upon only by the district court. *Cf. Brown*, 348 U.S. at 112; App. 33-34. If some remote hypothetical possibility of criminal prosecution for property damage disentitles claimants to sue in this case, then no active duty serviceman can *ever* recover under the FTCA, and the *Feres* exception has come to completely subvert what Congress originally intended as the FTCA's "broad pattern of liability. . . . " *See Brown*, 348 U.S. at 112.

Brown was the last case deciding "incidence to service" that stated the Court's views as to the doctrine's philosophical underpinnings. The Court stated that the *Feres* decision had been bottomed on the

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[6] Not only is there no evidence in the record of negligence by any non-civilian actor, plaintiffs have offered – and again offer in this Court – to stipulate upon remand that no negligence by any military serviceperson contributed in any way to decedents' deaths.

> peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .

Id. As noted above, to allow the survivors of these deceased sailors to sue for deaths occurring not in the line of duty and caused by the negligent acts of civilians would in no way conflict with the policies which this Court contemporaneously identified the *Feres* doctrine as serving. But the Ninth Circuit declined to even consider *Feres*'s intended goals, substituting an arid fact-based inquiry for any legal or policy analysis. App. 8. The Ninth Circuit's decision should be reversed because it is in stark conflict with, and indeed ignores, directly applicable Supreme Court cases.

II. THE CIRCUITS ARE IN SUBSTANTIAL CONFLICT IN THEIR APPLICATION OF *FERES*'S "INCIDENT TO SERVICE" TEST, AND THIS COURT MUST STEP IN TO ESTABLISH NATIONAL UNIFORMITY.

A. In the Absence of Any Specific Holding by this Court Explaining How to Determine "Incidence to Service", the Circuits Have Been Left to Come Up With Their Own Methods.

The Third Circuit has observed that this Court has never "articulated a specific method for determining whether an injury is incident to military service." *Richards v. United States*, 176 F.3d 652, 655 (3d Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000). Likely this is because "the Supreme Court has not had occasion to apply Feres

nearly so broadly as have the circuit courts." App. 11. This comparative rudderlessness has left the circuits to their own devices, sometimes scurrying to re-work their own tests *ad hoc* to bring them into line with perceived course changes in this Court's application of the doctrine. *See, e.g., Atkinson v. United States*, 804 F.2d 561, 563 (9th Cir. 1986) (military mother's medical malpractice claim to be reinstated in light of recent Court pronouncement that "danger of second-guessing military discipline", not present here, now the "overriding" policy consideration in *Feres* cases, the other two traditional rationales for the doctrine "no longer controlling"), *modified* at 813 F.2d 1006 (9th Cir.), *reversed after rehearing*, 825 F.2d 202, 205-06 (9th Cir. 1987) (*Johnson* revived the two "largely discredited and abandoned" *Feres* rationales of "distinctively federal relationship" and "availability of alternative compensation systems", both found to support bar of plaintiff's suit).

While the decision below is at odds with this Court's jurisprudence, the conflict between the various Circuits' different approaches stands the *Feres* doctrine on its very head. One of *Feres*'s stated goals was to avoid those "divergencies" in the laws of the different situses that were "notorious" and created a chaotic welter of "laws which fluctuate in existence and value. . . . " *See Feres*, 340 U.S. at 142-43. A claimant's right to sue under the FTCA now depends on the jurisdiction in which he is lucky enough to live – or to die. The anomalous upshot is that the interpretations of *Feres* prevailing in other Circuits would have allowed plaintiffs their day in court.

B. Under Other Circuits' Markedly Different Applications of *Feres*, Petitioners' Claims Would Not Have Been Barred.

In determining what is or is not "activity incident to service" the Ninth Circuit (as noted) has "reached the unhappy conclusion that the *Feres* cases are irreconcilable", and thus that " 'comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine' is the most appropriate way" to resolve individual cases. App. 8, citing *Dreier*, 106 F.3d at 848, quoting *Estate of McAllister v. United States*, 942 F.2d 1473, 1477 (9th Cir. 1991) ("[p]recisely how a court should apply the *Feres* doctrine to the facts of a given case . . . remains unclear", *id.*), *cert. denied*, 502 U.S. 1092 (1992). Although the Ninth Circuit may "look to" its four factors when "a *Feres* bar is not clear" (*Dreier*, 106 F.3d at 849), one can plausibly accuse the court's hollow "comparison of fact patterns" of being, in effect, not a legal test at all. Other Circuits have devised at least four different approaches, any of which could have allowed petitioners' claims to proceed.

The Third Circuit, along with the Seventh, Eleventh, and D.C. Circuits, considers various "factors" "in light of the totality of the circumstances" (among them duty status, accident situs, and the nature of the service member's activity when injured). *Richards*, 176 F.3d at 655; *accord, Stephenson v. Stone*, 21 F.3d 159, 164 (7th Cir. 1994); *Whitley v. United States*, 170 F.3d 1061, 1070-75 (11th Cir. 1999); *Verma v. United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) (per curiam). Once these courts determine that a plaintiff was injured in an "activity incident to service," judicial inquiry ends; *Feres* bars the suit regardless of "whether or not the circumstances of a case implicate the rationales for the *Feres* doctrine." *Verma*, 19 F.3d at 647;

accord, Selbe v. United States, 130 F.3d 1265, 1268 (7th Cir. 1997); *Whitley*, 170 F.3d at 1075. Had the panel below followed the interpretation of *Feres* applied by the Eleventh Circuit in *Whitley*, plaintiffs' suit would likely have gone forward. In that case, the parents of a foreign serviceman successfully sued the United States when their son was killed in an auto accident due to the negligence of an American military service member. The court affirmed, finding that to permit their recovery would not impinge on military discipline, in that the deceased had been killed off base, traveling from "a sport rather than a military exercise" while in a "furlough-like" or "authorized off-duty status." *Id.*, at 1075. There is scant difference between Costo's and Graham's "far remove[ ]" from any military context when they died and the facts that allowed Whitley's suit to proceed in the Eleventh Circuit. *See also Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001) ("The rationale behind this [Circuit's] test is to separate cases that may interfere with military discipline and command decisions from those that do not"). Although the panel below relied upon the base commander's potential involvement or liability, the record shows no connection whatsoever – beyond a hypothetical one – between his military acts and the conduct of a raft trip by distant civilian subordinates.

The First, Fourth, Fifth, Sixth, and Tenth Circuits also decide whether activity is incident to service by assessing "the totality of the circumstances" as evidenced by "certain factors" and "prongs." However, all of these Circuits understand and apply *Feres* as grounded in this Court's three traditional rationales: the peculiarly federal service member/government relationship, the uniform availability of certain disability and death benefits, and the desire to avoid judicial entanglement in military affairs. *Miller v.*

United States, 42 F.3d 297, 301-02 (5th Cir. 1995); *accord*, *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-83 (1st Cir. 1999); *Stewart v. United States*, 90 F.3d 102, 104-05 (4th Cir. 1996); *Mackey v. United States*, 226 F.3d 773, 776-77 (6th Cir. 2000); *Shaw v. United States*, 854 F.2d 360, 362 (10th Cir. 1988). The First, Fourth, and Tenth Circuits weigh all three rationales equally, but the Fifth and Sixth do not. The Fifth Circuit concerns itself with the relationship between the service member and the armed services and thus will "often treat the serviceman's duty status as the most important factor. . . . " *Schoemer v. United States*, 59 F.3d 26, 28 (5th Cir.), *cert. denied*, 516 U.S. 989 (1995). The Sixth Circuit, by contrast, considers mainly whether allowing an FTCA action would "impermissibly insinuate the civilian judiciary into military decisions." *See, e.g.*, *Fleming v. U.S. Postal Service*, 186 F.3d 697, 700 (6th Cir. 1999).

Although the Ninth Circuit confesses that it does not even try to analyze military FTCA cases in light of *Feres*'s underlying purposes, the panel still specifically found that Costo's and Graham's situations were "far removed" from the doctrine's original concerns. This conclusion would allow plaintiffs to prosecute their claims in the First, Fourth, Fifth, Sixth and Tenth Circuits. Even more certainly would their suit proceed in the Eighth Circuit, which eschews multi-pronged inquiries into factors and instead looks directly to the three underlying *Feres* rationales (*see, e.g.*, *Brown v. United States*, 151 F.3d 800, 804-05 (8th Cir. 1998)): if hearing an action would frustrate *Feres*'s purposes, the action is barred. It thus would surely follow that *Feres* would not block plaintiffs' suit, "far removed" as it is from the doctrine's original rationales.

Plaintiffs' claims would also be heard under the Second Circuit's application of *Brooks* and *Feres*, which posits

that they are best understood, and their progeny best reconciled, as creating a sort of military analogue to civilian workers' compensation schemes. *See Taber*, 67 F.3d at 1037-45; *cf. Bradshaw v. United States*, 443 F.2d 759, 762 (D.C. Cir. 1971) ("[T]he *Brooks-Feres* distinction falls into the work related-non work related dichotomy characteristic of workmen's compensation schemes generally."). In most cases, therefore, injury results from activity "incident to service" only if the victim was injured while acting within the scope of his military employment. The plaintiff in *Taber* sued the government for injuries arising out of a vehicular accident and alleged the government's liability under *respondeat superior*. *Taber*, 67 F.3d at 1052. The court held that *Feres* did not bar the claim: the plaintiff had not been acting in the scope of his employment when he was hit, and "negligence alleged in the operation of a vehicle" does not implicate the types of issues involving tortfeasor military discipline that might require a bar in the "extreme case."[7] *Id.*, at 1049 & 1052.

The same is true here. Rafting in the wilds with mostly civilian companions during a vacation from work of at least four days' duration was hardly within the scope of Costo's and Graham's employment as Navy sailors. Because petitioners allege the negligence of *civilians*, this case cannot be shown to remotely implicate such

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[7] The "extreme case" is represented by the fact pattern in *Shearer, supra* (FTCA barred claim of Army's negligent failure to maintain disciplinary control over soldier who murdered another soldier), which forcefully implicated considerations of military discipline. *See Taber*, 67 F.3d at 1052; *cf. Wake v. United States*, 89 F.3d 53, 58, 61, *as amended*, 1996 U.S. App. LEXIS 35578 (2d Cir. 1996) (holding that scope-of-employment considerations did not come into play and barring recovery in part because of disciplinary considerations).

matters of military discipline as could trigger *Taber*'s one stated exception. Guiding a river-rafting trip is a distinctly non-military act that has no bearing on the chain of command. Under *Taber*, plaintiffs' case would have been heard because decedents were not injured in the course of any sort of "activity incident to service."[8]

III. THIS COURT SHOULD RECONSIDER *FERES* AND ADOPT AN APPROACH CONSONANT WITH THE FTCA.

A. Courts and Commentators Have Long Criticized the *Feres* Doctrine as Unjust and Unsound.

The Ninth Circuit erected a *Feres* bar in this case not because it thought the doctrine wise, but only because it thought itself bound by *stare decisis*. It noted that it had for over twenty years invoked *Feres* with a heavy heart.[9]

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[8] While the panel here acknowledged *Taber* almost wistfully, it declined to apply it (App. 11-12), and the Sixth Circuit has expressly rejected it (*see Skees v. United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997)).

[9] *See, e.g., Veillette v. United States*, 615 F.2d 505, 505 (9th Cir. 1980) ("Reluctantly, we affirm"); *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981) ("*Feres* doctrine today stands on shaky ground with its precise justification somewhat confused"), *cert. denied*, 456 U.S. 989 (1982); *Atkinson, supra*, 825 F.2d at 206 (although "[f]our justices now believe that *Feres* was wrongly decided", panel nonetheless "compelled" to affirm dismissal of plaintiff's case); *Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991) ("[i]t would be tedious to recite. . . . the countless reasons for feeling discomfort with *Feres*. . . . Seemingly manacled by precedent, this Circuit has repeatedly expressed its strong reservations before ultimately overcoming them"); *McAllister*, 942 F.2d at 1480 (Court felt that it "must affirm . . . follow[ing] a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine").

And the Ninth Circuit is hardly alone in this regard; jurists from every Circuit have joined the chorus of disapproval, voicing their hopes that the Supreme Court will one day either overhaul and make sense of the *Feres* doctrine, or relegate it to the dustbin of history.[10]

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[10] *From the First Circuit*: Circuit Judges Boudin, Lynch, Lipez, and Selya, and District Judges Carter and Acosta. *See Day*, 167 F.3d at 681-85; *id.* at 683 (writing that "[p]ossibly *Feres* itself deserves reexamination by the Supreme Court"); *Briggs v. United States*, 617 F. Supp. 1399, 1402 (D.R.I. 1985), *aff'd mem.*, 787 F.2d 578 (1st Cir. 1986); *Graham v. United States*, 753 F. Supp. 994, 995 & n.1 (D. Me. 1991); *Jones v. LaRiviera Club, Inc.*, 655 F. Supp. 1032, 1033 n.6 (D.P.R. 1987).

From the Second Circuit: Circuit Judges Leval, Calabresi, Pierce, Mahoney, Feinberg, Van Graafeiland, Meskill, Kaufman, and Mansfield, and District Judges Raggi and Weinstein. *See Taber*, 67 F.3d at 1038-1049; *id.* at 1038 (calling *Feres* "extremely confused and confusing"); *Sanchez v. United States*, 813 F.2d 593, 595 (2d Cir. 1987); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985); *Kohn v. United States*, 680 F.2d 922, 925 (2d Cir. 1982); *Veloz-Gertrudis v. United States*, 768 F. Supp. 38, 41 (E.D.N.Y.), aff'd mem., 953 F.2d 636 (2d Cir. 1991), *cert. denied*, 504 U.S. 911 (1992); *In re "Agent Orange" Prod. Liability Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.) (noting the "widespread, almost universal criticism of *Feres* by the lower federal courts and commentators"), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984).

From the Third Circuit: Chief Judge Becker and Circuit Judges Sloviter, McKee, Nygaard, Rendell, Hunter, Higginbotham, Adams, Stapleton and Sarokin, and District Judges Ditter and Gerry. *See O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (dissent from denial of petition for rehearing) ("harshness of the doctrine" compels dissenters to "urge the Supreme Court to grant *certiorari* and reconsider *Feres*"); *Richards*, 180 F.3d at 565 (dissent from denial of petition for rehearing and rehearing en banc) (case presents "yet another compelling argument for the abandonment of the *Feres* doctrine" which it calls a "travesty"); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984);

Numerous commentators have also criticized *Feres*, arguing on the basis of detailed analyses of the text, structure,

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Mondelli v. United States, 711 F.2d 567, 569 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); *Ocello v. United States*, 685 F. Supp. 100, 103 (D.N.J. 1988); *Punnett v. United States*, 602 F. Supp. 530, 531 (E.D. Pa. 1984); *Hall v. United States*, 528 F.Supp. 963, 967 (D.N.J. 1981), *aff'd mem.*, 668 F.2d 821 (3d Cir. 1982).

From the Fifth Circuit: Circuit Judges Thornberry, Johnson, Garwood, Goldberg, Fay, and Anderson. *See Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Parker v. United States*, 611 F.2d 1007, 1011 (5th Cir. 1980).

From the Eighth Circuit: Circuit Judges Magill, Bright, Murphy, Richard Arnold, Bowman, and Heany, and District Judge Doty. *See Cutshall v. United States*, 75 F.3d 426, 429 (8th Cir. 1995) ("We note . . . that the *Feres* doctrine has been roundly criticized as unjust and unwarranted"); *Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) (applying *Feres* bar because "we are obligated" but "with a pronounced lack of enthusiasm"); *C.R.S. v. United States*, 761 F. Supp. 665, 669 & n.1 (D. Minn. 1991).

From the Ninth Circuit: In addition to Circuit Judges McKeown, Alarcon and Ferguson in this case, Circuit Judges Betty Fletcher, Norris, Trott, Goodwin, Thompson, O'Scannlain, Dorothy Nelson, Reinhardt, and Canby, and District Judges Singleton and Battin. *See Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991) ("[T]his circuit has accepted *Feres*, albeit grudgingly, as an ineradicable feature of our legal landscape, [but] even *Feres* concatenations must come to an end") (internal quotation marks omitted); *McAllister*, 942 F.2d at 1476-77 & n.2 (calling *Feres* "this troubled doctrine"); *Persons*, 925 F.2d at 299 (referring to "the countless reasons for feeling discomfort with *Feres*"); *Monaco, supra.*

From the Tenth Circuit: Circuit Judges Doyle, Breitenstein, and McKay. *See LaBash v. U.S. Department of the Army*, 668 F.2d 1153, 1156 (10th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

and legislative history of the FTCA that the decision was incorrect.[11] *Feres*'s critics have also included no fewer than three current members of this Court.[12] Finally, the

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From the Eleventh Circuit: Circuit Judges Hatchett, Godbold, and Fay. *See Elliott v. United States*, 13 F.3d 1555, 1559-61 (11th Cir.), *vacated*, 28 F.3d 1076 (11th Cir.), *judgment aff'd by equally divided court*, 37 F.3d 617 (11th Cir. 1994).

From the District of Columbia Circuit: Circuit Judges Tamm and Wald, and District Judge Joyce Green. *See Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980).

[11] *See, e.g.*, Seidelson, *From* Feres *v.* United States *to* Boyle *v.* United Technologies Corp.: *An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219 (1994); Wells, *Providing Relief to the Victims of Military Medicine*, 32 DUQ. L. REV. 109 (1994); Tomes, Feres *to* Chappell *to* Stanley: *Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990); Bennett, *The* Feres *Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1984); Seidelson, *The* Feres *Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Rhodes, *The* Feres *Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976); Note, *Servicemembers' Rights Under the* Feres *Doctrine: Rethinking "Incident To Service" Analysis*, 33 VILL. L. REV. 175 (1988); Note, *Military Medical Malpractice and the* Feres *Doctrine*, 20 GA. L. REV. 497 (1986); Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 YALE L.J. 992 (1986); Comment, *The* Feres *Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929 (1983); Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979).

[12] Justices Scalia and Stevens (joined by Justices Brennan and Marshall) argued in dissent in *Johnson*, 481 U.S. at 692-703, that *Feres* was wrong when decided. Justice Ginsburg criticized *Feres* in her concurring and dissenting opinion in *Lombard v. United States*, 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983), noting that "the *Feres* Court's interpretation of the FTCA continues to be questioned" and calling *Feres* "a problematic court precedent." *Id.* at 229 n.7, 233;

judicial and academic criticism of *Feres* has been "widespread, almost universal" (*Johnson*, 481 U.S. at 700 (internal quotation marks omitted)), and uniform. Aside from being unjust and unworkable, *Feres* is illegitimate. It should be overruled.

B. The *Feres* Doctrine Has Proven Unworkable In Practice.

Experience has shown that the *Feres* rule has proved completely unworkable. That much is clear from the conflicting decisions from the various Circuits that have unsuccessfully attempted to formulate and apply a sensible test. For example, in one Eleventh Circuit case an on-leave active duty serviceman and his family while asleep in their on-base quarters were seriously injured by carbon monoxide from a negligently-maintained water heater. They were ultimately allowed to prosecute an FTCA lawsuit – even though the case was virtually on all fours with the *Feres* decision itself. *Cf. Elliott v. United States*, *supra*, with *Feres*, *supra*.

The Court has rejected a rule that was virtually *Feres*'s twin in *Solorio v. United States*, 483 U.S. 435 (1987). *O'Callahan v. Parker*, 395 U.S. 258 (1969), had held that court-martial jurisdiction under the Uniform Code of Military Justice depended on whether the offense charged was "connected" to an accused's military service. *Id.*, at 272. In part because this "service connection" test "proved confusing and difficult" to apply, the Court overruled *Callahan* and abolished its test, erasing eighteen years of precedent. *Solorio*, 483 U.S. at 448. Justice Harlan had predicted in his dissent in *O'Callahan* that its "service

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see also Veillette, 615 F.2d at 506 (per Fletcher, J., joined by Kennedy, J.) (court applied *Feres* bar only "[r]eluctantly").

connection" test would spawn "infinite permutations of possibly relevant factors"and would "create confusion and proliferate litigation." 395 U.S. at 284 (Harlan, J., dissenting); cf. *Solorio*, 483 U.S. at 448-50 & nn. 13-17. The same could just as soon be said of *Feres*.

C. *Feres* Was Wrongly Decided.

The *Feres* decision should be revisited for an even more fundamental reason: it was wrongly decided. Any suggestion that *Feres* correctly construed the FTCA is indefensible. In devising a new exception to FTCA liability for those claims based on "injuries to servicemen [that] arise out of or are in the course of activity incident to service" (340 U.S. at 146), and doing so notwithstanding Congress's enactment of thirteen specific statutory exceptions, the *Feres* Court not only ignored the principle that *expressio unius est exclusio alterius*, but also failed to give proper weight to evidence in the FTCA's text, structure, and legislative history showing no intent to create such an exception.

That evidence included: Congress's express inclusion of "members of the military or naval forces of the United States" in its definition of those "employee[s] of the Government" whose acts may give rise to liability (28 U.S.C. § 2671); its further specification that "acting within the scope of employment" under the FTCA means, for members of the military, "acting in [the] line of duty" (*id.*); and its inclusion of several other exceptions that clearly contemplated tort claims by military personnel (including the discretionary function exception, the exception for claims arising in a foreign country, and, perhaps most importantly, the exception for all "claim[s] arising out of the combatant activities of the military or naval forces . . . during time of war" (*id.*, § 2680(a), (k) and (j))). As

these provisions show, Congress plainly anticipated that the FTCA would permit liability for most – but not all – claims arising out of military activities. By creating an exception to the FTCA for *all* claims arising out of activity incident to service, the *Feres* Court turned the process of statutory construction upside down when it developed its rule from the Military Personnel Claims Act, which the FTCA had explicitly *repealed*. *See Feres*, 340 U.S. at 144 (relying on the earlier Act's exclusion of "claims of military personnel" "incident to their service"); *cf.* Pub. L. No. 79-601, title IV, § 424, 60 Stat. 842 (1946) (repealing 31 U.S.C. § 223b). *See generally* Note, United States *v.* Johnson: Feres *Doctrine Gets New Life and Continues To Grow*, 38 AM. U. L. REV. 185 ("NOTE"), 202 n.121 (1988) ("The [*Feres*] Court noted that the Military Personnel Claims Act, a federal law, allowed servicemen to recovery for injuries incurred not incident to service; however, the FTCA repealed this law").

Nor is this all. There is ample evidence in the legislative history of the FTCA that Congress never meant to create an exception along the lines recognized in *Feres*. As one commentator has explained, the bill that became the FTCA originally included an exception for all military suits, but that exception was dropped during the legislative process, perhaps "because of adverse criticism expressed in an earlier hearing on earlier bills." NOTE, at 195 & n.66. Moreover, Congress's last-minute clarification that the exception was for *combat* activities further undercuts the rule stated in *Feres*. Originally the Act was drafted to exclude all claims arising out of wartime military activities. *See* 92 Cong. Rec., July 25, 1946, at 10093. During a hearing on the bill, the House without debate or dissent adopted Representative Monroney's amendment which added the word "combatant" to the language of

the exception. *See id.* By explicitly providing that only claims arising out of combat activities were to be excluded from FTCA coverage, Congress presumably intended military personnel claims arising from *non*-combat activities to be protected (even during times of war!). *See* NOTE, at 196 (footnotes omitted). *Feres* thus has no real basis in the text, structure, or history of the FTCA.[13]

Although one justification for the *Feres* doctrine identified by the Court has been a need for uniformity in the law governing a service member's recovery in tort (*see Johnson*, 481 U.S. at 689), in practice *Feres*'s "incident to service" test has had the opposite effect, so that different jurisdictions allow or bar recovery in cases with virtually indistinguishable facts. *Cf., e.g., Ricks v. United States*, 842 F.2d 300 (11th Cir. 1988) (*Feres* barred claim for death of serviceman on temporary disability retired list) *with Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988) (*Feres* did not bar claim for death of serviceman on temporary disability retired list). While service members are afforded government benefits when injured – another reason supposedly justifying *Feres*, *see Johnson*, 481 U.S. at 689-90 – those benefits today (perhaps unlike in 1950) are not nearly the equivalent in value to tort judgments, and the discrepancy continues to increase. *See Taber*, 67 F.3d at 1045. Moreover, the availability of military benefits has never by itself barred recovery in tort, since certain members of the military – those who, as in *Brooks*, are held not

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[13] In fact, the Court no longer pretends that it does. *See Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting). Instead of being grounded in the FTCA itself, the *Feres* doctrine purports to represent "three disembodied estimations of what Congress *must* (despite what it enacted) have intended" in the FTCA. *Id.* at 695 (dissent) (emphasis in original). And "[t]hey are bad estimations at that." *Id.*

to have been hurt in "activity incident to service" – can receive both benefits and tort damages, with the former offsetting the latter so as to prevent double recovery. And while *Feres* purportedly aims to shield military discipline and decision-making from inexpert civilian inquiry, *see Johnson*, 481 U.S. at 690-91, those processes are equally threatened in lawsuits brought for injuries to civilians, which the *Feres* doctrine has never precluded. In sum, "neither the three original *Feres* reasons nor the *post hoc* rationalization of 'military discipline' justifies [the Court's] failure to apply the FTCA as written." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). "*Feres* was wrongly decided" (*id.*), and it should be overruled.

D. *Stare Decisis* Provides No Adequate Reason To Deny Review.

Despite the government's likely argument to the contrary, *stare decisis* should not prevent the Court from rethinking the *Feres* doctrine. "It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled." *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988) (per curiam). *Stare decisis* is, after all, only "a principle of policy rather than an inexorable command." *Hohn v. United States*, 524 U.S. 236, 251 (1998) (internal quotation marks omitted). To whatever degree *Feres* arose from language in the FTCA, it is worth remembering that this Court has not hesitated to overrule cases construing statutes when "a precedent may be a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision." *Patterson*, 491 U.S. at 173. And this Court will also overrule decisions interpreting a statute where they "should

not be followed" in part because the earlier case's "conclusion was erroneous." *Hohn*, 524 U.S. at 251. Those epithets describe *Feres* precisely. And, of course, *stare decisis* poses no obstacle to this Court's consideration of petitioners' first question presented, which by itself presents a valid independent basis to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. WEPPNER
Counsel of Record
LAW OFFICE OF ROBERT A. WEPPNER
2133 Third Avenue, Suite 108
Seattle, WA 98121-2387
(206) 728-9332

STEVEN S. ROSENTHAL
HOLLAND & KNIGHT, L.L.P.
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006-6801
(202) 955-3000

J. MICHAEL KOCH
LAW OFFICE OF J. MICHAEL KOCH & ASSOCIATES, P.S., INC.
Post Office Box 368
Silverdale, WA 98383
(360) 692-5551

App. 1

United States Court of Appeals,
Ninth Circuit.

Suzanne C. COSTO, as Personal Representative for Nollie P. Costo; Pedro Costo, husband; Rosa Costo, wife; Jeffrey Graham, as Personal Representative for Christopher J. Graham, Plaintiffs-Appellants,

and

Nollie P. Costo; Christopher J. Graham, Plaintiffs,

v.

UNITED STATES of America, Defendant-Appellee.

No. 99-36101.

Argued and Submitted Oct. 6, 2000

Filed April 20, 2001

Lowell V. Sturgill Jr., Civil Division, Department of Justice, Washington, D.C., for the defendant-appellee.

Robert A. Weppner, Law Office of J. Michael Koch and Associates, P.S., Inc., Silverdale, Washington, for the plaintiffs-appellants.

Appeal from the United States District Court for the Western District of Washington; John C. Coughenour, District Judge, Presiding. D.C. No. CV-98-01227-JJCC.

Before: ALARCON, FERGUSON, and McKEOWN, Circuit Judges.

Opinion by Judge McKEOWN; Dissent by Judge FERGUSON.

McKEOWN, Circuit Judge:

This tort case is a suit stemming from a personal tragedy. Nollie Costo and Christopher Graham drowned during an employer-sponsored rafting trip, and their estates sued their employer for negligence. But their employer is not an ordinary one. It is the United States Navy. Thus, the suit is barred unless the United States has waived its sovereign immunity. To determine whether the suit can properly proceed, we must confront – yet again – the *Feres* doctrine, which limits the United States' waiver of sovereign immunity. We conclude that this suit falls within the doctrine's ever-expanding reach. We reach this conclusion only reluctantly, bound by circuit precedent to apply this doctrine to yet another case that seems far removed from its original purposes.

I. Factual and Procedural Background

Nollie Costo and Christopher Graham were sailors in the United States Navy, stationed at Naval Air Station Whidbey Island, in Oak Harbor, Washington. On July 1, 1995, they participated in a Navy-led recreational rafting trip on the Nooksack River in Whatcom County, Washington. Both were off duty and on liberty[1] at the time. The trip, which included three rafts, was led by Brian Benjamin, a civilian in charge of the base's rafting program.

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[1] According to the government, "on liberty" refers generally to the time between the end of normal working hours on one day, and the beginning of normal working hours on the next. It includes weekends.

The rafting program was operated within the command structure of the military. The Navy sponsors various recreational programs that are intended to "effectively contribute to the morale, well-being and quality of life of naval personnel and their family members." Department of the Navy, Bureau of Personnel Instruction (BUPERINST) 1710.11B ¶ 3 (July 1, 1994), *available at* http://www.bupers.navy.mil. Among these are the Morale, Welfare and Recreation (MWR) programs.

According to Navy regulations, the "administration, supervision, and operation of local MWR programs supporting all eligible personnel is a command function and is the responsibility of cognizant commanding officers." *Id.* at Authorities and Responsibilities ¶ 3. Here, the commanding officer was Captain John Schork. Underneath Schork was the MWR Director, Thomas Lindscott, a civilian. Lindscott was accountable to Schork "for the program content, financial integrity, and health and successful accomplishment of the MWR mission." *Id.* at Authorities and Responsibilities ¶ 4.

Beneath Lindscott in the chain of command was Richard Score, also a civilian, who headed the recreation division of MWR. Score, in turn, supervised Edward Dunning, a civilian, who managed the Outdoor Recreation Center. It was Dunning who implemented the rafting program. He advertised in local papers for a lead raft guide, and eventually hired Brian Benjamin to head the rafting program. Benjamin hired Tim Herron, first as a guide, then eventually to handle logistics and training.

Prior to the tragic trip, Benjamin and Cathy Crouch – a civilian guide trained by Benjamin – scouted the route.

When they did, they observed a log blocking the river, and determined that the rafts would have to pass through a narrow channel to avoid the log.

On the trip itself, the three rafts reached the log shortly after the trip had begun. The first raft negotiated the narrow channel without difficulty. As the remaining two boats prepared to negotiate the channel, they pulled too close to one another for both to pass safely, and one boat hit the log and flipped over. All of the boat's passengers fell into the water. Costo and Graham were trapped beneath the water in the log's submerged branches and drowned.

Costo's parents and personal representative and Graham's personal representative (collectively referred to as "the estates") brought suit against the United States in federal court in Washington.[2] In their Complaint, brought under the Federal Tort Claims Act, 28 U.S.C. § 1346, they alleged that MWR "breached its duty to the plaintiffs" by failing to obtain a rafting permit; failing to hire trained guides; and failing to properly supervise those guides. They further alleged that MWR breached its duty by failing to scout out the river, to warn the rafters of the river's condition, to properly equip the rafts, to properly instruct the rafters, to rescue the rafters, and to administer life saving aid.

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[2] It is unclear whether damages in this lawsuit is the only remedy they sought; the record does not reflect whether the estates sought or received damages under the Veterans' Benefits Act.

The United States moved to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The district court granted the motion, holding that, because the estates' claims fell within the *Feres* doctrine, the suit was barred by sovereign immunity.

Whether the *Feres* doctrine applies to the facts in the record is reviewed de novo. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir.1996). Factual findings are reviewed de novo, with all disputed facts resolved in favor of the non-moving party. *Id.* We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

II. The *Feres* Doctrine-Background

The passage of the Federal Tort Claims Act (FTCA) in 1948 resulted in a broad waiver of the Federal Government's sovereign immunity: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. However, this blanket waiver contained an exception, by which the Government withheld consent to be sued for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). Only two years later, this exception was broadened significantly by the Supreme Court, which held in *Feres v. United States* that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152

(1950). This broad exception has been labeled "the *Feres* doctrine."

The Supreme Court has enunciated three policy rationales for the *Feres* doctrine: 1) the distinctively federal nature of the relationship between the Government and the armed forces requires a uniform system of compensation for soldiers stationed around the country and around the world; 2) a generous compensation scheme for soldiers (the Veterans' Benefits Act) serves as an ample alternative to tort recovery; and 3) permitting military personnel to sue the armed forces would endanger discipline. *See United States v. Johnson*, 481 U.S. 681, 684 n. 2, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987).

These policy justifications and the doctrine itself have been heavily criticized by commentators and by this Court. *See, e.g., Estate of McAllister v. United States*, 942 F.2d 1473, 1480 (9th Cir.1991) ("In [affirming the district court], we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine."). The goal of uniformity has been criticized as textually unsupported, *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting), and illogical, *id.* at 695-96, 107 S.Ct. 2063 (Scalia, J., dissenting) ("nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery"). Further, it has been observed that if uniformity is the goal, it makes just as much sense to establish a federal common law of torts as it does to bar all tort suits. *Taber v. Maine*, 67 F.3d 1029, 1040 (2d Cir.1995). The second rationale for the bar to tort suits – the existence of the Veterans' Benefits Act – has been criticized as incoherent, given the fact that in certain cases, soldiers have been permitted to recover under *both* the VBA and the FTCA.

Johnson, 481 U.S. at 697-98, 107 S.Ct. 2063 (Scalia, J., dissenting).

The third policy rationale – the danger to discipline – has been identified as the best explanation for *Feres*. *United States v. Shearer*, 473 U.S. 52, 57, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985); *Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir.1983).[3] This rationale has not, however, escaped criticism. If the danger to discipline is inherent in soldiers suing their commanding officers, then *no* such suit should be permitted, regardless of whether the "injuries arise out of or are in the course of activity incident to service." But *Feres* itself imposes this limitation. If the fear is that civilian courts will be permitted to second-guess military decisions, then even civilian suits that raise such questions should be barred. But they are not. *See Johnson*, 481 U.S. at 699-700, 107 S.Ct. 2063 (Scalia, J., dissenting).

Perhaps because of these criticisms, circuit courts – including ours – have shied away from attempts to apply these policy rationales. *See Taber*, 67 F.3d at 1043 (citing cases from the Fifth and Eleventh Circuits). Instead, we have outlined four factors to consider in determining whether a particular suit should be barred by the *Feres* doctrine:

1) the place where the negligent act occurred;

2) the duty status of the plaintiff when the negligent act occurred;

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[3] The Ninth Circuit case of *Johnson v. United States*, 704 F.2d 1431 (9th Cir.1983) is unrelated to the Supreme Court case bearing the same name, *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987).

3) the benefits accruing to the plaintiff because of his status as a service member; and

4) the nature of the plaintiff's activities at the time the negligent act occurred.

Dreier, 106 F.3d at 848 (citations omitted).

Even this four-factor test must be qualified. First, none of these factors is dispositive. Rather than seizing on any particular combination of factors, we have focused on "the totality of the circumstances." *See, e.g., Dreier,* 106 F.3d at 852; *Millang v. United States,* 817 F.2d 533, 535 (9th Cir.1987).[4] Second, we have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, " 'comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine' is the most appropriate way to resolve *Feres* doctrine cases." *Dreier,* 106 F.3d at 848 (citing *Estate of McAllister,* 942 F.2d at 1477). With these competing considerations as well as the four factors in mind, we consider the case at hand.

III. Application of the *Feres* Doctrine

Our inquiry begins – and, in large measure, ends – with *Bon v. United States,* 802 F.2d 1092 (9th Cir.1986), a closely analogous Ninth Circuit case. In *Bon,* we considered claims brought by a Navy servicewoman who rented a canoe for recreational purposes from a Navy-run recreational center, and was hit and injured by a serviceman

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[4] This approach may be a retrenchment against our unfortunate conversion of the four non-exclusive factors listed in *Johnson,* 704 F.2d at 1436-41, into a four-part test.

driving a recreational motorboat also rented from the base. *Id.* at 1093. We noted that both parties to the accident were on active duty when it occurred; that the activity was provided as a benefit of Bon's military service; and that the activity was "incident to military service" because the boat rental was governed by military regulations, and the program was under the command of the base's commanding officer. *Id.* at 1095. Thus, we held that the *Feres* doctrine barred suit.

Bon resembles the case at bar in each of these particulars. Like Janice Bon, Costo and Graham were on active duty but on liberty at the time of the accident. Like the canoe rental in *Bon*, the rafting trip was provided as a benefit of military service. And, as in *Bon*, the MWR program here was under the command of the base's commanding officer. On these facts alone, *Bon* would be dispositive.

The estates' efforts to distinguish *Bon* are unavailing. It is of no consequence that the alleged tortfeasors were civilians. This much is clear from the Supreme Court's decision in *Johnson*, 481 U.S. at 691 & n. 11 (applying the *Feres* doctrine, in a case involving the alleged negligence of civilian Federal Aviation Administration employees). Nor is our decision affected by the fact that the accident occurred off-base. The appropriate consideration is the "situs of the negligence," not the location of the accident. *Johnson v. United States*, 704 F.2d at 1436. Here, much of the alleged negligence was supervisory, and occurred on base. Moreover, this factor is not dispositive, *id.* at 1436-37, and does not overcome the factors in this case that weigh to the contrary.

Beyond just *Bon*, it has long been recognized – in our court, at least – that military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties. Thus, in *Uptegrove v. United States*, we held that the family of Uptegrove (a soldier) could not sue the military for Uptegrove's death in a military plane crash, despite the fact that Uptegrove was on leave, on his way to vacation with his family, and aboard the military aircraft only as a "space available" passenger. 600 F.2d 1248, 1249 (9th Cir.1979). Likewise, in the context of medical malpractice suits, we have consistently barred suit – even when the injury did not arise out of the course of duty. *See, e.g., Estate of McAllister*, 942 F.2d at 1474; *Persons v. United States*, 925 F.2d 292, 296 (9th Cir.1991) ("Although he was off-duty, Kelly Persons enjoyed the use of the naval hospital 'solely by virtue of his status as a serviceman,' *Millang*, 817 F.2d at 535, and the doctors who treated him were subject to military orders."); *Atkinson v. United States*, 825 F.2d 202 (9th Cir.1987) (barring a medical malpractice suit arising from the prenatal care given to a soldier in a military hospital). Indeed, the *Feres* case itself involved medical malpractice.

Cases from outside the Ninth Circuit mirror this approach. In a range of factual situations, the courts of appeals have held that recreational activities sponsored by the military fall within the *Feres* doctrine. *See, e.g., Pringle v. United States*, 208 F.3d 1220, 1227 (10th Cir.2000) (soldier beaten by gang members after being ejected from military MWR club; "The relationship between the Army and service personnel engaged in recreational activities under the Army's MWR program is 'distinctively federal' in character."); *Jones v. United States*, 112 F.3d 299, 301 (7th

Cir.1997) (medical malpractice suit against military physicians arising from an injury suffered while training for the Olympics; "In fact, courts have often concluded military personnel acted 'incident to service' and applied the *Feres* bar in cases arising from servicemembers taking advantage of recreational military activities or other military perquisites because their use of the facilities was a consequence solely of their status as members of the military."); *Walls v. United States*, 832 F.2d 93 (7th Cir.1987) (crash of airplane belonging to recreational Aero Club); *Rayner v. United States*, 760 F.2d 1217 (11th Cir.1985) (elective surgery); *Woodside v. United States*, 606 F.2d 134 (6th Cir.1979) (crash of airplane belonging to recreational Aero Club); *Hass ex rel. United States v. United States*, 518 F.2d 1138, 1141 (4th Cir.1975) (injury while riding a horse rented from a Marine Corps-operated stable; "Recreational activity provided by the military can reinforce both morale and health and thus serve the overall military purpose."); *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir.1966) (death in on-base swimming pool; "As a matter of fact, Airman Chambers' use of the pool, which was a part of the base, was related to and dependent upon his military service; otherwise, he would not have been privileged to use it.").

In citing this litany of cases, it bears note that the Supreme Court has not had occasion to apply *Feres* nearly so broadly as have the circuit courts. Indeed, it has been suggested that the Supreme Court's cases could be interpreted to fall within the very limitation – activity based on military duty – that the estates urge us to apply here. *Cf. Taber*, 67 F.3d at 1044-45, 1049-50 & n. 21 (analogizing *Feres* to workers' compensation systems, and suggesting

that *Feres* be interpreted to bar suit " . . . for personal injuries sustained 'in the performance of [the soldier's] duty.' " (quoting 5 U.S.C. § 8102(a))). As the estates contend, the Supreme Court cases typically involve "activit[ies] incident to service" that implicate military duty, *see, e.g., Johnson,* 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648, or situations where military discipline was important precisely because it so fundamentally implicated the functioning of the military, *see, e.g., Shearer,* 473 U.S. at 58, 105 S.Ct. 3039. None of these cases involve military-sponsored recreation. But whatever the original scope of the *Feres* doctrine, it is clear that it has been interpreted throughout the lower courts – and, specifically, by our court – to include military-sponsored recreational programs. Therefore, we are compelled to hold that the estates' suit is barred.

IV. Conclusion

As we noted at the outset, we apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes. *See, e.g., McAllister,* 942 F.2d at 1480; *Persons,* 925 F.2d at 299; *Atkinson,* 825 F.2d at 206; *Monaco v. United States,* 661 F.2d 129, 134 (9th Cir.1981). But until Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow this well-worn path.

AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

I begin this dissent with the understanding that I and this Court of Appeals must abide by the decisions of the Supreme Court. I write to demonstrate that the *Feres* doctrine is unconstitutional and to present the Supreme Court with a case and controversy in order for it to be able to review the doctrine. *See United States v. Johnson*, 481 U.S. 681, 692, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J., dissenting).

I believe that the *Feres* doctrine violates the equal protection rights of military service men and women. I also believe that *Feres* violates our constitutional separation of powers.

In passing the Federal Tort Claims Act (FTCA), Congress chose to place all Americans on an equal footing in litigating the civil liability of the federal government for claims of tort injuries. 28 U.S.C. § 1346. From this unprecedented, albeit limited, waiver of sovereign immunity, Congress excluded claims arising out of a number of government activities, including "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). This exception of liability for injuries in times of war was expanded by the *Feres* doctrine to all injuries of military personnel "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950). This doctrine represents judicial legislation, effectively negating the Congressional limitations that the

excluded claims must arise from "combatant activities . . . during time of war." 28 U.S.C. § 2680(j). The doctrine effectively declares that the members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans.[1]

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[1] This inequity has been felt as courts have applied *Feres* to bar claims arising from *non-combatant* activities engaged in during times of *peace*. *See, e.g., United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (*Feres* barred claims arising from crash of Coast Guard helicopter during civilian rescue mission against civilian tortfeasor); *Bon v. United States*, 802 F.2d 1092 (9th Cir.1986) (*Feres* barred claims arising from crash of two recreational water vehicles operated by military personnel); *Borden v. Veterans Admin.* 41 F.3d 763 (1st Cir.1994) (*Feres* barred claims for medical malpractice by civilian employees arising from basketball knee injury sustained by off-duty soldier); *Bozeman v. United States* 780 F.2d 198 (2d Cir.1985) (*Feres* barred action by widow of military policeman killed off-duty and off-base in a crash where the driver had been drinking at non-commissioned officers' club); *Sanchez v. United States*, 878 F.2d 633 (2d Cir.1989) (*Feres* barred action for negligent repair of brakes by military service station that used civilian employees); *Woodside v. United States* 606 F.2d 134 (6th Cir.1979) (*Feres* barred action arising from death of off-duty serviceman while training to receive commercial pilot's license), *Jones v. United States*, 112 F.3d 299 (7th Cir.1997) (*Feres* barred claim arising from negligent surgery while soldier assigned to try out for United States Military Olympics team); *Del Rio v. United States*, 833 F.2d 282 (11th Cir.1987) (*Feres* barred claim for negligent prenatal care); *Davis v. U.S. Dep't of Army*, 602 F.Supp. 355 (D.Md.1985) (*Feres* barred claim for negligent disposal of corpse of fetus born at Army hospital). In these and other *Feres* cases, the "incident to service" test appears to have given way to an "incidental to service" inquiry, further distorting Congress' original language in the FTCA.

This judicially-created classification runs afoul of the Equal Protection clause of the 14th and 5th Amendments. Clearly, had Congress barred all claims by members of the military it would have been within its constitutional powers to do so. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 66-67, 83, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981) (holding that Congress acted within its constitutional authority in authorizing the military registration of men but not women). Indeed, as the *Feres* court noted, Congress was cognizant of potential military claims when drafting the FTCA and, had it chosen to do so, could have explicitly excluded them. *See Feres*, 340 U.S. at 138-39, 71 S.Ct. 153 (noting that all but two of the eighteen drafts of the FTCA considered by Congress barred suits by members of the military); 28 U.S.C. § 2671 (specifically including "members of the military or naval forces of the United States" "acting in the line of duty" in its enumeration of individuals and acts for which the United States may be liable). Likewise, as Congress enacted the FTCA, its decision to bar suits by military members arising in combat during times of war easily passes equal protection scrutiny. Because service men and women are not a "suspect class," and their access to federal court under the FTCA is not a "fundamental right," see *Miller v. United States*, 73 F.3d 878, 881 (9th Cir.1995), Congress' classification needed merely to be rationally related to a legitimate government interest. *See Vacco v. Quill*, 521 U.S. 793, 799-801, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997). This standard "does not allow us to substitute our personal notions of good public policy for those of Congress." *Schweiker v. Wilson*, 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981). It is not for "the judiciary [to] sit as a

superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). *See also United States v. Johnson*, 481 U.S. 681, 702, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J., dissenting) (arguing that the only possible justification for the chaos created by the *Feres* doctrine would be if it reflected a decision grounded in the democratic process).

When considering the *Feres* doctrine, however, we are not dealing with a legislative action, but rather with a judicial re-writing of an unambiguous and constitutional statute. Even to the courts that have considered it, the *Feres* decision stands not for an interpretation of statute but rather a "judicially created exception" to the FTCA. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (Marshal, J., dissenting); *Schoemer v. United States*, 59 F.3d 26, 28 (5th Cir.1995); *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir.2000); *Romero by Romero v. United States*, 954 F.2d 223, 224 (4th Cir.1992). This judicial re-writing runs against our basic separation of powers principles and complicates a equal protection analysis of the resulting *Feres* doctrine. *See* THE FEDERALIST NO. 47 (James Madison) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would then be the legislator") (quoting Montesquieu); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("Courts have been very reluctant, as they should be in our federal system and with our respect

for the separation of powers, to closely scrutinize legislative choices"); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-195, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.")

I do not suggest that judges never alter legislation, but that they should never overrule the plain language of Congress unless there is a constitutional violation. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79, 2 L.Ed. 60 (1803). Although the Constitution clearly delegates law-making activities to the legislature and law-interpreting activities to the judiciary, the reality of our judicial system is that courts must occasionally take more active roles in order to interpret an ambiguous statute, *Comm'r of Internal Revenue v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 121, 107 S.Ct. 2275, 96 L.Ed.2d 97 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided"), or to prevent a statute from running afoul of the Constitution, *Elfbrandt v. Russell*, 384 U.S. 11, 14-19, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966). Legislative silence on an issue may also require judges to determine, through history or analogy, the most appropriate legal rule in a particular situation. *See, e.g., Georgia-Pacific Corp. v. United States Envtl. Prot. Agency*, 671 F.2d

1235, 1240 (9th Cir.1982); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 250 n. 17 (4th Cir.1994).

Feres presented neither ambiguity nor constitutional violation nor legislative silence.[2] Instead, *Feres* took a fairly small, clearly defined, legislatively-created classification and broadened it considerably. As the Supreme Court has noted repeatedly, this kind of classification "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and *the fact [that] the*

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[2] The Supreme Court has suggested that *Feres* presented a situation where "the literal words [of the FTCA] would bring about an end completely at variance with the purpose of the statute." *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 315, 73 S.Ct. 706, 97 L.Ed. 1020 (1953). This is a puzzling statement. As the *Feres* court itself noted, the "Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres*, 340 U.S. at 139, 71 S.Ct. 153. Denying all suits by members of the military incurred "incident to service" has certainly not furthered this purpose. The *Feres* court justified this seeming contradiction by finding that the FTCA only imposed liability where a parallel private right of action otherwise would have existed. However, as Justice Scalia noted in his dissent in *United States v. Johnson*, 481 U.S. at 694-95, 107 S.Ct. 2063, this interpretation was not supported by a reading of the text of the FTCA (which imposed liability for the tortious performance of other traditional government functions) and was explicitly rejected by the Supreme Court in later cases. *See Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Simply put, there is no apparent contradiction between the exception crafted by Congress and the purpose of the FTCA that would justify a judicial re-writing of the plain meaning of the statute.

line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." FCC v. Beach Communications, Inc., 508 U.S. 307, 315-16, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (quoting *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1981)) (emphasis added). The result raises both equal protection and separation of powers concerns and, I believe, violates our Constitution.

There is no authority suggesting a standard of review for an act of judicial legislation, and I hesitate to propose one. Surely, however, a more stringent standard than "rational review" applies to classifications created by the judiciary rather than the legislature, as the constitutional implications are greater. *Cf. Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) (noting that in cases considering the constitutionality of court fees the Court applies a hybrid of its "due process" and "equal protection" analyses). The Supreme Court, in protecting another balance of constitutional powers, that between state and federal governments, has created an exacting standard requiring Congress to convincingly articulate concerns of sufficient urgency before encroaching on state immunity. *See, e.g., Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, ___, 121 S.Ct. 955, 964, 148 L.Ed.2d 866 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). Even if the relationship between the ends and means need merely be rational, the judiciary should articulate a reason that it is necessary to ignore the balance of federal powers. This *Feres* failed to do.

A brief history of the fate of the four *Feres* rationales illustrates my point.[3] The *Feres* Court initially proffered three rationales for the *Feres* decision. It subsequently rejected the first rationale, *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and noted that the other two rationales were "no longer controlling," *United States v. Shearer*, 473 U.S. 52, 58 n. 4, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985). In the meantime, the Court developed a fourth rationale, not considered by *Feres*, and labeled it the "best" justification for the *Feres* decision. *Id.* at 57. This fourth rationale – the negative effect of lawsuits on military discipline and decision-making – did not do much to support a *Feres* bar in the Court's most recent *Feres* case, which involved a civilian tortfeasor. *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987). The Court instead revived the second and third rationales from *Feres* and stated that all

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[3] These rationales, discussed further below, were:

1. There was no "parallel liability" in the private sector for injuries to soldiers. *Feres*, 340 U.S. at 141-142, 71 S.Ct. 153.
2. Given the "distinctively federal" relationship between the U.S. and its military forces, Congress did not intend it to be subject to local tort law. *Id.* at 142-44, 71 S.Ct. 153.
3. Soldiers already receive veterans' benefits, and Congress could not have intended for them to be able to receive double compensation for their injuries. *Id.* at 144-45.
4. Courts should be highly deferential to military decision-making and discipline procedures. *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 99 L.Ed. 139 (1954).

three surviving rationales applied. *Id.* at 688-91. If Congress had engaged in such inconsistent and post hoc rationalization to invade the spheres of executive, judicial, or state powers, the Constitution would not have permitted it. *Cf. Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (finding that the Bankruptcy Act of 1978 was invalid because it threatened to encroach upon Article III courts despite characterization to the contrary by Congress); *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (finding Congressional oversight committee effectively encroached on executive branch); *Alden v. Maine*, 527 U.S. 706, 731-35, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (finding that Congressional legislation impermissibly encroached on state immunity).

We can speculate forever upon reasons why *Feres* refused to apply a law written by Congress. It is clear that *Feres* recognized that the direct and unambiguous command of Congress created liability for claims caused by members of the military or naval forces of the United States, *Feres*, 340 U.S. at 138, 71 S.Ct. 153; 28 U.S.C. § 2671, and that the direct and unambiguous command of Congress exempted only claims arising out of combatant activities during time of war, *Feres*, 340 U.S. at 138, 71 S.Ct. 153; 28 U.S.C. § 2680(j). If a statute is ambiguous then it is a necessary judicial function to clarify it. But *Feres* did not take this approach in reaching its conclusion. Instead, it appears to have re-evaluated the law. For example, the Court declared as one reason for its rejection of a Congressional mandate "[t]hat the geography of an injury should select the law to be applied to [a soldier's]

tort claims makes no sense." *Feres*, 340 U.S. at 143, 71 S.Ct. 153. This language reveals that the Court simply did not agree with Congress and searched in puzzling ways to declare that military personnel are not equal to civilians.

The Court recently had occasion to evaluate a judicial classification in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). There, the Court evaluated a decision by the Florida Supreme Court that allowed disputed ballots to be counted according to an "intent of the voter" standard. Putting aside the separation of powers question, the Court stated that the "problem [with the judicially-created classification] inheres in the absence of specific standards to ensure its equal application." *Id.* at 530. As many commentators have noted, one of the hallmarks of the *Feres* cases is the ill-defined standard "incident to service" that has lead [sic] to very unequal applications even within the military. *See, e.g.*, Anne R. Riley, *United States v. Johnson: Expansion of the Feres Doctrine to Include Servicemembers' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 266-67 (1989) ("Consistent in denying recovery, the Court is embarrassingly inconsistent in how it arrives at this result"); Martha J. Burns, *They Fight to Protect Our Rights; Shouldn't we do the Same for Them? Intramilitary Immunity in Light of United States v. Stanley*, 38 DEPAUL L. REV. 127, 154 (Fall, 1988) ("If the Supreme Court had established a definition for 'incident to service' in this case, it would have negated the problems that result from the inconsistent definitions and applications of the term"). *Compare, e.g., Ricks v. United States*, 842 F.2d 300 (11th Cir.1988) (*Feres*

barred claim for death of serviceman on temporary disability retired list), *and Cortez v. United States*, 854 F.2d 723 (5th Cir.1988) (*Feres* did not bar claim for death of serviceman on temporary disability retired list).

Even if we were to apply a rational basis analysis – the most lenient of equal protection inquiries – to the *Feres* doctrine, the Court's jurisprudence in this area over the past fifty years defies this approach. In the last case to directly address *Feres*, *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987), Justice Scalia, in a dissent joined by Justices Brennan, Marshall, and Stevens, thoroughly and articulately rebutted the four most common justifications for the continued application of the *Feres* doctrine. *Johnson*, 481 U.S. at 692-703, 107 S.Ct. 2063 (Scalia, J., dissenting). Not only is each justification belied by reality and the language of the FTCA, but each justification has, at various points, been discredited by the Court.

The first justification proffered by *Feres* was that there was no parallel private right of action whereby military members could sue their employer. *Feres*, 340 U.S. at 141-42, 71 S.Ct. 153. This ignores other provisions of the FTCA, however, which opened to liability a number of areas where parallel private rights of action did not previously exist, including the "transmi[ssion of] postal matter, 28 U.S.C. § 2680(b), collect[ion of] taxes or custom duties, § 2680(c), impos[ition of] quarantines, § 2680(f), [and regulation of] the monetary system, § 2680(i)." *Johnson*, 481 U.S. at 694, 107 S.Ct. 2063 (Scalia, J., dissenting). This rationale was also rejected by the Court in subsequent FTCA cases. *Rayonier Inc. v. United*

States, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957); *Indian Towing*, 350 U.S. at 66-69, 76 S.Ct. 122.

The second justification was the "distinctively federal" relationship between the Government and the military that risked being supplanted by local tort law. Putting aside the Court's preference for "uniform nonrecovery" over "nonuniform recovery," *Johnson*, 481 U.S. at 695-96, 107 S.Ct. 2063, Justice Scalia observed that "we have effectively disavowed this 'uniformity' justification . . . by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting *civilians* to recover for injuries caused by military negligence." *Id.* at 696, 107 S.Ct. 2063 (emphasis in original). *See also Hunt v. United States*, 636 F.2d 580, 598 (D.C.Cir.1980) ("[G]iven the Supreme Court's inconsistent treatment of this factor, it cannot be said that the presence of an alternative compensation system either explains or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable."). *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 449-50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (finding that an ordinance did not pass rational basis scrutiny where the proffered justification was too attenuated from the classification). The Court stated that this rationale of the distinctively federal relationship was "no longer controlling" in *Shearer*, 473 U.S. at 58 n. 4, 105 S.Ct. 3039, before reviving it in *Johnson*, 481 U.S. at 688-90, 107 S.Ct. 2063.

The Court gave the third *Feres* rationale the same treatment. *See Shearer*, 473 U.S. at 58 n. 4, 105 S.Ct. 3039; *Johnson*, 481 U.S. at 688-90, 107 S.Ct. 2063. This rationale reasoned that, despite the plain language of the FTCA, Congress did not intend to allow military personnel to

recover under the FTCA when they were guaranteed recovery under the Veterans Benefit Act ("VBA"), 38 U.S.C. § 301. *Feres*, 340 U.S. at 144. In fact, however, "both before and after *Feres* [the Court] permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA." *Johnson*, 481 U.S. at 697, 107 S.Ct. 2063 (citing *Brooks v. United States*, 337 U.S. 49, 53, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) and *United States v. Brown*, 348 U.S. 110, 111, 75 S.Ct. 141, 99 L.Ed. 139 (1954)). *See also Sidley v. United States Dep't of Navy*, 861 F.2d 988 (6th Cir.1988) (holding that *Feres* barred claim even though serviceman had been denied veteran's benefits), *Cf. Cleburne*, 473 U.S. at 449-50, 105 S.Ct. 3249 (holding that an ordinance failed the rational basis test where the stated policy objectives were not met by the challenged classification).

It was only in cases after *Feres* that the Court articulated its dominant explanation for the *Feres* doctrine – the possibly negative effect on military discipline and decision-making. *Brown*, 348 U.S. at 112, 75 S.Ct. 141; *Shearer*, 473 U.S. at 57, 105 S.Ct. 3039. The Court's holding in *Johnson* – barring a military widow from suing a *civilian* tortfeasor – calls this rationale into doubt. Furthermore, the text of the FTCA already accommodates the Court's concerns about interfering in "military judgments and decision that are inextricably intertwined with the conduct of the military mission." *Johnson*, 481 U.S. at 691, 107 S.Ct. 2063 (majority opinion). The Act itself prohibits everyone, military and civilian, from suing for discretionary actions that implicate policy judgments, 28 U.S.C. § 2680(a), or for "claims arising in foreign countries, § 2680(k), intentional torts, § 2680(h), and claims based on

the execution of a statute or regulation, § 2680(a)." *Id.* at 699-700, 107 S.Ct. 2063 (Scalia, J., dissenting). The *Feres* decision was not necessary to preserve our tradition of judicial deference to the "complex subtle, and professional decisions as to the compositing, training, equipping, and control of a military force," *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). Perhaps this is why *Feres* did not seek to rely on this rationale. I am left to conclude that the only conceivable reason for the Court to engage in re-writing of such a momentous statute was that it believed that Congress had not given enough protection to the government against the men and women in the armed forces. It is curious that the Court thought that it had to protect the government against those persons whose sole duty was to protect the government.

The articulated "rational bases" for the *Feres* doctrine lead in this case, as in many cases, to inconsistent results that have no relation to the original purpose of *Feres*. Less than half of the persons on the rafting trip that claimed the lives of Costo and Graham were identified as members of the armed services. The holding today would have allowed any of the civilians injured or killed on the trip to sue, but barred such recourse to the military personnel, despite the fact that the two suits would have implicated virtually identical policy concerns regarding the law of the situs and military decision-making. On the other hand, had Costo and Graham participated in a similar rafting trip run entirely by civilians, they may have been able to sue, yet still collect veteran's benefits. I cannot find a rational basis for the court to engage in such line-drawing on the basis of an "incident to service"

test. Under the exceptions Congress has already placed in the FTCA, if the negligence leading to Costo and Graham's death implicated protected policy judgments, their executors would not be able to sue the government regardless of *Feres*. 28 U.S.C. 2680(a).

Although the Court's efforts to provide a "rational basis" for the classifications created by *Feres* have not been successful, the actions of this Circuit have been even worse. We have recognized the impossibility of applying the *Feres* rationales and instead retreated to the four-prong factual inquiry described by the majority in this case. *Majority op.* at 866-67. *See also Dreier v. United States*, 106 F.3d 844, 848-49 (9th Cir.1996); *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir.1986). We have, in short, abandoned any pretense that there is a rational basis for the classifications drawn in the original *Feres* opinion, and yet we have continued to apply the "incident to service" test with little thought to the constitutional principles at stake.[4] Nor have we been the only circuit to take this approach. *See Pringle v. U.S.*, 208 F.3d 1220, 1224 (10th Cir.2000); *Schoemer v. U.S.*, 59 F.3d 26, 28-29 (5th Cir.1995). *See also Maas v. U.S.*, 94 F.3d 291, 295 (7th Cir.1996) ("Application of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case. Rather, the test is whether the injuries are based on 'service-related activities' ") (citation omitted). This

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[4] The majority cites the doctrine of *stare decisis* as the grounds for its decision today. *Stare decisis*, however, is a "principle of policy," not "an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (citations and quotations omitted), and it must yield where constitutional values are at stake.

blind adherence has proved virtually unworkable, a result that only underscores the wisdom of our founding fathers and the fragile complexities of our system of government.[5] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments").

It is time for the Supreme Court to revisit the *Feres* doctrine. If it is to be applied, the equal protection issues it raises must be reconciled with the constitutional principles that courts have so often articulated.

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[5] It may be argued that the *Feres* doctrine has been on the books for fifty years, and that Congress could have amended it during this time should it have chosen to do so. *See Johnson*, 481 U.S. at 686, 107 S.Ct. 2063. Even the Supreme Court, however, warns against reading too much into legislative silence. *James v. U.S.*, 366 U.S. 213, 220, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961) ("the fact that Congress has remained silent or has re-enacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors") (citing *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 90 L.Ed. 1084 (1946); *Helvering v. Hallock*, 309 U.S. 106, 119-22, 60 S.Ct. 444, 84 L.Ed. 604 (1940)). Furthermore, Congress could not have written anything that is not already plain and direct in the statute except to say that *Feres* is wrong, and that would not change anything.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUZANNE C. COSTCO [sic*], et al., Plaintiff, v. UNITED STATES OF AMERICA, Defendant	CASE NO. C98-1227C ORDER

This matter comes before the Court on the United States's motion to dismiss plaintiffs' lawsuit for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and, in the alternative, for summary judgment under Fed. R. Civ. P. 56. For the reasons set forth below, the motion to dismiss is GRANTED. Based on this conclusion, the Court declines to reach the merits of the summary judgment motion.

BACKGROUND

Plaintiffs bring this wrongful death action against the United States for the deaths of Nollie Costco and Christopher Graham, two active duty sailors in United States Navy who died while participating in a rafting trip sponsored by the Navy's Morale, Welfare, and Recreation ("MWR") Department. The MWR Department, established under the

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* The name Costo is misspelled as "Costco" throughout the district court's Order.

authority of the Chief of Naval Operations, sponsors programs designed to provide support services and recreational activities that contribute to the morale, well-being, and quality of life of sailors and their families. The local MWR program operates under the control of Commanding Officer John Schork, who oversees the Recreation Services Division and the Outdoor Recreation Center ("ORC"). The ORC, which runs the recreational programs, sponsored a rafting program staffed by a lead rafting guide and Navy employee, Brian Benjamin, and other volunteers. One of the rafting trips in this program took place in the Nooksack River in Washington State, located about seventy-five miles away from the Whidbey Island Naval Air Station, where Costco and Nollie were stationed. During one of the runs in the rafting trip, Costco's and Graham's raft was pulled by swift current into a log. As a result, their raft flipped, they became trapped in underwater branches, and drowned. Plaintiffs allege, in part, that Costco and Graham died as a result of the rafting guides' negligence and the MWR's failure to train and supervise the guides it hired. Plaintiffs bring this wrongful death suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq.*, which waives the government's sovereign immunity from liability for the negligent conduct of its employees. The United States moves for an order of dismissal on the grounds that the Feres doctrine bars plaintiffs' lawsuit because the deaths occurred in the course of activity incident to service. The Court agrees.

ANALYSIS

I. Motion to Dismiss Standard

Defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges the facts upon which subject matter jurisdiction depends. In a factual attack, the Court may not presume the truthfulness of plaintiffs' allegations and may, where necessary to resolve factual disputes, weigh evidence regarding the merits of subject matter jurisdiction. *See Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (quoting *Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)).

II. The Feres Doctrine

In *Feres*, the United States Supreme Court broadly restricted the FTCA's general waiver of the government's sovereign immunity. *Feres v. United States*, 340 U.S. 135 (1950). According to what became known as the Feres doctrine, the Court lacks jurisdiction over claims by active duty members whose injuries arise out of or are in the course of activity incident to service. To determine whether an activity is incident to service, the Court may consider the following relevant factors: (1) the place where the negligent act occurred; (2) the plaintiff's duty status at the time; (3) the benefits plaintiff accrues because of his or her status as a service member; and (4) the nature of plaintiff's activities at the time the negligent act occurred. *See Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986); *Roush v. United States*, 752 F.2d 1460, 1462 (9th Cir. 1985); *Johnson v. United States*, 704 F.2d 1431, 1436-39 (9th Cir. 1983). In reviewing these factors, the Court's key inquiry is whether the suit has a potential

impact on military command and its disciplinary structure. *See Johnson*, 704 F.2d at 1436; *United States v. Shearer*, 473 U.S. 52 (1985).

In reviewing Ninth Circuit precedent, the Court finds this case to be most analogous to *Bon*, which barred a lawsuit by an active duty military member who suffered injuries while engaged in a recreational activity while on authorized leave. After weighing the relevant factors in that case, the Ninth Circuit held that the injuries occurred in the course of an activity incident to military service. With the analogous facts of this case, the Court is compelled to reach a similar conclusion.

Plaintiff's purport to distinguish this case on the fact that the incident occurred over seventy-five miles away from the Naval Air Station and, therefore, not on military property. While the location of the incident weighs slightly against imposing a Feres bar, this factor alone is not controlling. *See Bon*, 802 F.2d at 1095. As in *Bon*, the Court finds the other factors strongly weigh in favor of a Feres bar.

First, the Ninth Circuit relied on the fact that Bon was taking part in an activity provided as a benefit of her military service. Likewise, the Court finds that Costco and Graham participated in the rafting trip by virtue of their status as Navy personnel. According to the guidelines for patron eligibility, trip participants need to establish some relationship with the Navy, Military, or the Department of Defense. In addition, testimony indicates that the Navy owned and provided all of the equipment for the rafting trip, thereby saving on the cost of running

the program. Accordingly, Costco's and Graham's military status allowed them to participate in the program and to benefit from a low-cost trip.

Second, the Ninth Circuit in *Bon* focused on the fact that the nature of the activity was such that its entire scope was subject to military orders and discipline. Similarly, the presence of military control in this case weighs strongly in favor of a Feres bar. Plaintiffs contend that neither Costco nor Graham were subject to military discipline or participating in an activity under direct military command because there were civilians on board, the rafting guides were not subject to direct military orders or control, and there was no requirement for Commanding Officer Schork to approve any of the programs created by the MWR. Plaintiffs' arguments, however, are not persuasive in light of the evidence presented in this case.

Although Costco and Graham were not under direct military command during the rafting trip, the chain of command structure in this case specifies that the ORC operated under the command of Commanding Officer John Schork, who was responsible for the administration, supervision, and operation of local MWR programs. Because plaintiffs challenge the Navy's lack of supervision and training of rafting guides, a civil action in this case would necessarily involve examining Commanding Officer Schork's decisions regarding supervision of Navy personnel. Further, as stated, the Navy owned and provided all of the equipment for the rafting trip. Because the Uniform Code of Military Justices sets forth provisions governing the loss, damage, or wrongful disposition of military property, Costco and Graham were subject to regulations governing the particular activity in

which they were engaged. *See* 10 U.S.C. §§ 877-934. As in *Bon*, the totality of the circumstances leads the Court to conclude that the accident took place in the course of activity incident to service, thereby precluding the Court's exercise of subject matter jurisdiction over plaintiffs' claim.

CONCLUSION

Accordingly, defendant's motion to dismiss is GRANTED. The Clerk of the Court is hereby directed to dismiss plaintiffs' lawsuit with prejudice.

SO ORDERED this 6 day of October, 1999.

/s/ John C. Coughenour
John C. Coughenour
Chief United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUZANNE C COSTO, as Personal Representative for Nollie P. Costo; PEDRO COSTO, husband, ROSA COSTO, wife; JEFFREY GRAHAM, as personal Representative for Christopher J. Graham Plaintiffs-Appellants and NOLLIE P COSTO; CHRISTOPHER J. GRAHAM, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 99-36101 D.C. No. CV-98-01227-JJCC ORDER (Filed June 29, 2001)

Before: ALARCÓN, FERGUSON, McKEOWN, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the petition for rehearing en banc. Judge Ferguson voted to grant the petition for rehearing, and would grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

28 USC § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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28 USC § 2671

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States. "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official

capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18. "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

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28 USC § 2680

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer

of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse

of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

FILED
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No. 01-526

In the Supreme Court of the United States

SUZANNE C. COSTO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MC CALLUM, JR.
Assistant Attorney General
ROBERT S. GREENSPAN
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTIONS PRESENTED

1. Whether the deaths of petitioners' decedents arose out of or occurred in the course of activity incident to service under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950).

2. Whether *Feres* v. *United States*, *supra*, should be overruled.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 248 F.3d 863. The opinion of the district court (Pet. App. 29-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2001. A petition for rehearing was denied on June 29, 2001 (Pet. App. 35-36). The petition for a writ of certiorari was filed on September 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 1, 1995, petitioners' decedents, Nollie P. Costo and Christopher J. Graham, were killed while

participating in a rafting trip that was sponsored by the Navy's Morale, Welfare, and Recreation Department. Pet. App. 2, 29. At the time of the accident, Costo and Graham were active-duty sailors stationed at the Naval Air Station, Whidbey Island, Washington (NAS Whidbey). *Id.* at 2. They were off duty (or, on "liberty") at the time of the accident, but they were eligible to participate in the trip because of their active-duty status. *Id.* at 2-3, 32-33. They were subject at all times to military discipline and regulations with respect to their conduct on the trip as well as their custody of the rafts, oars, and life vests that were provided by the Navy. *Id.* at 33-34.

The rafting trip was run by civilian employees of the Navy, and was under the command responsibility of the commanding officer at NAS Whidbey. Pet. App. 3. The trip was open to active duty personnel at NAS Whidbey and, on a space-available basis, to their family members and guests and others with official connections to the military. *Id.* at 32; C.A. R.E. 82-83. Of the 25 individuals who participated in the trip, nine were active duty service members, six were guides or guide trainees, and at least five others were family members of active duty personnel. Gov't C.A. Br. 9 (citations omitted). The record does not identify the type of service connection of the five other trip members. The trip was supported by Navy appropriated funds and by fees paid by individual rafters. Pet. App. 32.

2. Petitioners commenced this action in United States District Court for the Western District of Washington. They sought damages against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (Supp. V 1999), based on allegations that the Navy "breached its duty to the plaintiffs" by failing to obtain a permit for the rafting trip, failing

to hire properly trained guides, and failing to supervise properly the guides it hired. Pet. App. 4; C.A. E.R. 3 (Compl. paras. IX-XI). Petitioners also contend that the Navy "breached its duty" by failing to scout out the river, to equip the rafts properly, to instruct the rafters properly, to rescue the rafters, and to administer life-saving aid. *Ibid.*

The district court dismissed the complaint for lack of subject matter jurisdiction under the *Feres* doctrine, which bars FTCA suits by or on behalf of service members for service-related injuries. Pet. App. 29-34. The Ninth Circuit affirmed, holding that the decision was controlled by its prior decision in *Bon* v. *United States*, 802 F.2d 1092 (1986). *Bon* applied the *Feres* doctrine to bar an FTCA suit that was brought by a servicewoman who was injured when a canoe she had rented from a Navy recreational center was hit by a serviceman driving a recreational motorboat also rented from the center. The Ninth Circuit held that *Bon* is similar to this case because Costo and Graham, like the plaintiff in *Bon*, were injured while on active duty and while participating in a military recreational program to which they had access because of their active duty status. Pet. App. 8-9. Judge Alarcon dissented, on the ground that the *Feres* doctrine "violates the equal protection rights of military service men and women" and "violates our constitutional separation of powers." *Id.* at 13-28.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In *Feres*, this Court held that service members cannot bring tort suits against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. In subsequent cases, the Court "has never deviated from this characterization of the *Feres* bar," *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) (citations omitted), and has emphasized that the "incident to service" test requires a case-by-case approach that focuses on the totality of the circumstances. See *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). The court of appeals correctly applied that test in this case to bar claims based on the accident that occurred to petitioners' decedents while they were on active-duty military service and engaging in a military-sponsored activity that they participated in by virtue of their military status.

a. Petitioners contend (Pet. 13-15) that this Court's decisions in *Feres*, its prior decision in *Brooks* v. *United States*, 337 U.S. 49 (1949), and its subsequent decision in *United States* v. *Brown*, 348 U.S. 110 (1954), each lead to the conclusion that their action may go forward under the Federal Tort Claims Act. Those contentions are mistaken.

i. In *Brooks*, the Court held that servicemen injured in a car accident on a public highway could bring an FTCA action based on the negligence of the civilian driver of a military vehicle who hit them. It was a mere fortuity that the driver who hit the servicemen was driving a military, rather than a civilian, vehicle. The "accident had nothing to do with [the servicemembers'] army careers, * * * except in the sense that all human events depend upon what has already transpired." 337 U.S. at 52. The Court specifically left open the question —later decided in *Feres*—whether an FTCA action

would lie for injuries received "incident" to military service. *Ibid.*

In this case, unlike in *Brooks*, the connection between the accident and the decedents' military service was not a mere fortuity, and the accident was "incident to" the decedents' military service. Costo and Graham were involved in a military-sponsored activity at the time of their deaths, and they participated in that activity by virtue of their active-duty military status. Under this Court's cases, nothing more is necessary to make the *Feres* doctrine applicable.

ii. Petitioners also err in contending that *Feres* itself supports their claim. The Court in *Feres* addressed three claims, two of which involved medical malpractice and one of which involved a claim of wrongful death resulting from a barracks fire. Petitioners argue (Pet. 14) that this case is different from those in *Feres*, because Costo and Graham "were on prolonged liberty far from their duty stations" and "there is no hint in the record of negligence by any military service member—only by civilians."

Petitioners' contentions are mistaken. *Feres* did not turn on the location of the accidents, because active-duty members of the military are subject to military discipline and operate within the military command structure at a variety of locations. Nor did *Feres* turn on the military status of the party alleged to have been negligent. Indeed, in *Johnson*, the Court rejected petitioners' contention that the civilian status of the alleged tortfeasor is determinative. In that case, the Court held that the *Feres* doctrine barred an FTCA suit brought by the widow of a Coast Guard helicopter pilot who was killed while performing a rescue mission on the high seas. The Court applied *Feres* even though the alleged tortfeasors were civilians, explaining that "the

status of the alleged tortfeasor does not have * * * critical significance" in light of the rationales that support *Feres*, see 481 U.S. at 689, and noting that the lower courts have not understood "the military status of the alleged tortfeasor * * * to be relevant under *Feres*," *id.* at 686-687; see also *id* at 687 n.8 (citing cases).

iii. Finally, petitioners err in contending (Pet. 14) that this Court's decision in *Brown* supports their claim. The Court in *Brown* permitted an individual who had been discharged from military service years before to bring a suit based on alleged malpractice in a Veterans Administration hospital. The Court specifically distinguished in *Brown* between "injuries that did and injuries that did not arise out of or in the course of military duty." 348 U.S. at 113. Because the plaintiff in *Brown* had left the military years before the negligence that was the basis of his suit, his claim was not barred by the *Feres* doctrine. *Id.* at 112. In this case, by contrast, petitioners' decedents were on active military service at the time of the accident and the accident occurred while they were on a military-sponsored activity that they participated in by virtue of their military status. Nothing in *Brown* suggests that petitioners' claim may be brought notwithstanding the *Feres* doctrine.

2. Petitioners assert (Pet. 17-21) that the courts of appeals apply a variety of different analyses to determine the application of the *Feres* doctrine. Those analyses, however, largely represent differing verbal formulations that do not often result in conflicting results. Indeed, in cases involving fact-patterns similar to this case, the courts of appeals have consistently understood that the *Feres* doctrine bars FTCA suits in cases involving active-duty service members injured

while participating in military recreational programs open to them because of their active-duty status. In *Johnson*, this Court cited with approval two of the seminal "military recreation" cases. See 481 U.S. at 687 n.8 (citing *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979) (officer killed in plane crash allegedly due to negligence of civilian flight instructor employed by military flight club), and *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975) (suit by serviceman against civilian manager of military-owned horse stable)); see also *Walls* v. *United States*, 832 F.2d 93 (7th Cir. 1987) (airplane crash during recreational flying); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987) (auto accident during picnic), cert. denied, 485 U.S. 987 (1988); *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986) (boat accident); *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966) (swimming in pool at air base).

Petitioners contend (Pet. 18) that the decision of the court of appeals is inconsistent with the Eleventh Circuit's decision in *Whitley* v. *United States*, 170 F.3d 1061, 1070-1075 (1999). *Whitley*, however, did not even involve a member of the United States military. Instead, the case arose when a British soldier who was in the United States on a rugby tour was injured when a van driven by an American servicemember got into an accident while driving the British soldier/rugby player home from a military rugby tournament. The court in *Whitley* explained that the British soldier's FTCA action was not barred by *Feres* because "[h]e was off-duty during the extended time that he was in the United States to participate in the" rugby tour, *id.* at 1071, and because he was not under military control —even British military control—while he was on the rugby tour, *id.* at 1073 & n.25. Indeed the court in *Whitley* noted that "[p]articuarly significant" to its

decision were cases in which "the service members were not taking advantage of a military privilege or status during their leave or off-duty time." *Id.* at 1074. By contrast, petitioners' decedents were members of the United States (not a foreign country's) military, they were subject to military control at the time of the accident, and they were participating in the boating trip solely as a "military privilege * * * during their * * * off-duty time." There is no conflict between *Whitley* and the court of appeals' decision in this case.

Petitioners also contend (Pet. 20) that the court of appeals' decision conflicts with *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). In *Taber*, the court held that an off-duty servicemember who was "spend[ing] a romantic weekend with a companion," *id.* at 1051, could bring suit under the FTCA for an injury suffered when he was injured by another servicemember in a car accident. Unlike petitioners' decedents, the servicemember in *Taber* was not on a military-sponsored activity at the time of the accident, and his "romantic" week-end plans had nothing to do with his military status. There is no conflict between *Taber* and the decision of the court of appeals in this case.

3. Petitioners also argue (Pet. 21-30) that this Court should overrule *Feres*. This Court expressly reaffirmed the *Feres* doctrine in *Johnson*, however, noting that it has never deviated from *Feres* in the decades since that case was decided and that Congress, which has clearly been on notice of this Court's decisions in the area, has never modified the doctrine. See 481 U.S. at 686. In *Johnson*, the Court "decline[d] to modify the doctrine at this late date." *Id.* at 688. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is impli-

cated, and Congress remains free to alter what [this Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Fourteen years after *Johnson*—and with more than 50 years of precedent now supporting *Feres*—this Court should be even more reluctant to reexamine that settled statutory ruling.

Johnson reiterated that the *Feres* doctrine is supported by three important rationales. First, because "the relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." 481 U.S. at 689 (citations and internal quotation marks omitted). Second, "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (citations and internal quotation marks omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Ibid.* (citations omitted).

Since *Johnson* was decided, the Court has repeatedly denied petitions for certiorari urging that *Feres* be reexamined. In *Sonnenberg* v. *United States*, No. 90-539, the United States filed a brief in opposition explaining why further review to reexamine the *Feres* doctrine is unnecessary in light of *Johnson* and for

other reasons as well.[1] Since the Court denied certiorari in *Sonnenberg*, see 498 U.S. 1067 (1991), the United States has generally waived a response to petitions for certiorari in cases where the only question presented is whether *Feres* should be reexamined. See also *Richards* v. *United States*, 528 U.S. 1136 (2000) (denying certiorari where petition presented questions concerning both the application of *Feres* and the overruling of that case).

The government's brief in opposition in *Sonnenberg* responds fully to the arguments petitioner advances in seeking reexamination of the *Feres* doctrine here. Courts have had little difficulty applying the *Feres* doctrine, which is "alive and well," *Duffy* v. *United States*, 966 F.2d 307, 312 (7th Cir. 1992), and has been "broadly and persuasively applied by the federal courts," *Stewart* v. *United States*, 90 F.3d 102, 104 (4th Cir. 1996) (internal quotation marks omitted). Moreover, courts have extended the *Feres* doctrine to other areas of the law. For example, in the same Term *Johnson* was decided, this Court extended *Feres*'s "incident to service" test to *Bivens* claims. See *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987). Other courts have applied the *Feres* doctrine to service-related claims brought under 42 U.S.C. 1983 (Supp. V 1999). See *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683-684 (1st Cir. 1999); see also *Bois* v. *Marsh*, 801 F.2d 462, 470-471 (D.C. Cir. 1986) (*Feres* applies to intentional as well as negligent tort claims against individual military personnel); *Cummings* v. *Dep't of the Navy*, 116 F. Supp. 2d 76 (D.D.C. 2000), appeal pending, No. 00-5348 (D.C. Cir.) (claims under the

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[1] We have supplied petitioners with a copy of our brief in opposition in *Sonnenberg*.

Privacy Act). Contrary to petitioners' contentions (Pet. 25), *Feres*'s "incident to service" test is workable and is not in decline.

Furthermore, the *Feres* doctrine ensures that all service members—including those injured in combat abroad or in their quarters at home—receive a uniform set of benefits for service-related injuries, at a level determined by Congress and the Executive Branch. Compensation is awarded uniformly to all service members who are similarly situated, without regard to whether their injuries were incurred in training, in combat, or while receiving benefits.[2] That uniformity is an indispensable part of maintaining high morale among all our military forces. There is no basis to reexamine it now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MC CALLUM, JR.
Assistant Attorney General
ROBERT S. GREENSPAN
LOWELL V. STURGILL, JR.
Attorneys

NOVEMBER 2001

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[2] The FTCA specifically bars suits arising in foreign countries or in combat. 28 U.S.C. 2680(k) and (j).

Supreme Court, U.S
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No. 01-526

In The

Supreme Court of the United States

SUZANNE C. COSTO, AS PERSONAL REPRESENTATIVE FOR NOLLIE P. COSTO; PEDRO COSTO, HUSBAND; ROSA COSTO, WIFE; JEFFREY GRAHAM, AS PERSONAL REPRESENTATIVE FOR CHRISTIOPHER J. GRAHAM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

ROBERT A. WEPPNER
Counsel of Record
LAW OFFICE OF ROBERT A. WEPPNER
2133 Third Avenue, Suite 108
Seattle, WA 98121-2387
(206) 728-9332

STEVEN S. ROSENTHAL
HOLLAND & KNIGHT, L.L.P.
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006-6801
(202) 955-3000

J. MICHAEL KOCH
LAW OFFICE OF J. MICHAEL KOCH & ASSOCIATES, P.S., INC.
Post Office Box 368
Silverdale, WA 98383
(360) 692-5551

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OR CALL COLLECT (402) 342-2831

REPLY BRIEF

The Federal Tort Claims Act precludes suing the Government for claims "arising out of the combatant activities of the military . . . during time of war." 28 U.S.C. § 2680(j). The Court derived its "incident to service" test from this language over fifty years ago in *Feres v. United States*, 340 U.S. 135, 146 (1950). Respondent does not dispute that this Court has not elucidated this test in any holding since 1954. Pet. 9.

1. Respondent errs in asserting (without illustration) that the circuits' disparate applications of *Feres* (Pet. 16-20) represent no more than distinctions without a difference. *See* Br. in Opp. 6. Some courts have just despaired of any principled analysis of the doctrine. One has seen this Court as so far abandoning both statute and precedent that *Feres*

> encompass[es], at a minimum, *all* injuries suffered by military personnel . . . even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and . . . military activity. . . .

Major v. United States, 835 F.2d 641, 644-45 (6th Cir. 1987). And one need look no further than courts' opposite results on identical facts to see the mischief wrought in the long absence of guidance from this Court. *See* Pet. 25, 28.

2. Respondent would have it that the factual differences between this case, *Taber* and *Whitley* justify the unwarranted conclusion that these decisions are not disharmonious. Br. in Opp. 7-8. This *non sequitur* does not alter the fact that those cases' rationales, if applied to the facts below, would allow petitioners' claims to proceed.

That's a conflict. If it took identical fact patterns to demonstrate a conflict between circuits, grants of certiorari on this basis would be rare indeed.

3. Respondent twice advances the dubious proposition that the decedents' holiday outing was "incident to service" because "[t]hey were subject at all times to military discipline and regulations with respect to their conduct on the trip as well as their custody" of Navy rafting equipment. Br. in Opp. 2, 7-8. This argument proves too much, and would put "paid" to any meaningful limitation on the *Feres* doctrine. The only applicable "discipline and regulations" controlling the military rafters were those general sanctions available against all servicemen for any violation of the Uniform Code of Military Justice. *See* Pet. App. 33-34. Precedent teaches that the military has plenary court-martial jurisdiction over all of its active members. *Solorio v. United States*, 483 U.S. 435, 448 (1987). Respondent's proposal would therefore have the effect of rewriting the FTCA to allow " 'any claim but that of servicemen' ", a position this Court has rejected for over fifty years. *See Brooks v. United States*, 337 U.S. 49, 51 (1949).

4. The Government argues that *Brooks* cannot control the instant case because its salient feature was the "mere fortuity" that its plaintiffs were military members, while decedents here were killed because of their military status. Br. in Opp. 4-5. Respondent overlooks the sheer happenstance that it was Costo and Graham who died, rather than any civilian rafters (such as the 10-year-old boy on the trip) whose claims *Feres* would not have barred.

5. Respondent cites *United States v. Johnson* for the proposition that *stare decisis* militates against reexamining

Feres, saying that case "expressly reaffirmed" *Feres*. Br. in Opp. 8-9. Of course, the *Johnson* Court was not even asked to overrule *Feres*. *See Johnson*, 481 U.S. at 703 (Scalia, J., dissenting). Respondent also quotes this Court's observation that *stare decisis* takes on particular importance in cases of statutory interpretation. Br. in Opp. 8. But abundant language in the same decision makes plain that when "growth" of the law has "weakened the conceptual underpinnings" of precedent; or "inherent confusion" from an "unworkable decision" has wreaked "positive detriment to coherence and consistency in the law . . . "; or when " 'tested by experience, [a precedent] has been found to be inconsistent with the sense of justice or with the social welfare' "; overruling it may be not only proper, but necessary. *Patterson v. McLean Credit Union*, 491 U.S. at 172, 173, 174 (citations omitted). As it has been applied, *Feres* is precisely such a case.

6. Respondent asserts that its brief in opposition in *Sonnenburg v. United States* "responds fully" to petitioners' request that *Feres* be reexamined. Br. in Opp. 10. But that brief also overstates *Johnson*'s significance, again artfully omitting to mention that overruling *Feres* was not there at issue. And that brief's most ringing affirmation of the doctrine was that "incident to service" was a "relatively clear" test. This alleged clarity, however, was only in comparison to the worst-case scenario of "compelled depositions and trial testimony by military officers concerning the details of their military commands", a specter not remotely presented by this case. *Cf. United States v. Stanley*, 483 U.S. 669, 682-83 (1987) (emphasis added) *with* Pet. 14 & 14 n.6.

7. The six supporting cases respondent listed in *Sonnenburg* and lists again now (Br. in Opp. 7) are no more dispositive than they were eleven years ago. *Bon, Walls, Hass,* and *Woodside* all featured the sort of "strict and pervasive" regulation suggesting "direct and substantial" armed forces involvement that might render *post hoc* civilian judicial scrutiny particularly inappropriate. *See Bon,* 802 F.2d at 1095 n.3; *Walls,* 832 F.2d at 94 n.2; *Hass,* 518 F.2d at 1141 & 1141 n.2; and *Woodside,* 606 F.2d at 136-37 & 142. In *Millang,* especially, the allegation of negligence by an on-duty on-base military policeman was exactly "the type of claim that could well call military decisions into question." *See Millang,* 817 F.2d at 535 (citations omitted). Presence of no more particularized regulation in the case at bar than general UCMJ sanctions makes this case readily distinguishable. In addition, in *Walls,* Aero Club membership was open only to active duty military personnel – quite unlike the loose criteria for participation in this rafting trip by civilians and even aliens. *Cf. Walls, supra with* ER 60 & Supp. ER 54-58. Finally, the swimmer killed in an on-base pool in *Chambers* was "present and accounted for" and on active duty on the base that day, quite unlike the rafters here. *See Chambers,* 357 P.2d at 227-28.

8. Respondent's last and strongest argument is that uniform benefits are "indispensable", and non-uniform recovery would be fatal, to military morale. Br. in Opp. 11. But Justice Scalia's skewering of this "peculiar rule of solicitude" in *Johnson* is just as apt here. He observed that "the morale of [Johnson's] comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might

have recovered had he been piloting a commercial helicopter at the time of his death." *Johnson*, 481 U.S. at 695-96, 700 (Scalia, J., dissenting). Decedents' survivors should also not have to regret that their loved ones chose military careers.

9. Respondent also has no answer to the unprecedented and widespread chorus clamoring for *Feres*'s reversal or revision (Pet. nn.10-12), except to imply that the four *Johnson* dissenters, the many learned commentators, and the sixty-five or more federal judges who have called for its correction, are just plain wrong. This case involves facts that could scarcely less implicate the doctrine's core concerns. Petitioners respectfully request this Court to readdress the *Feres* doctrine and redefine it in a manner consistent with reason, justice, and a sound interpretation of the statute from which it purports to be derived.

Respectfully submitted,

ROBERT A. WEPPNER
Counsel of Record
LAW OFFICE OF ROBERT A. WEPPNER
2133 Third Avenue, Suite 108
Seattle, WA 98121-2387
(206) 728-9332

STEVEN S. ROSENTHAL
HOLLAND & KNIGHT, L.L.P.
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006-6801
(202) 955-3000

J. MICHAEL KOCH
LAW OFFICE OF J. MICHAEL KOCH
& ASSOCIATES, P.S., INC.
Post Office Box 368
Silverdale, WA 98383
(360) 692-5551